DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-126
Title: Greg McQuiggin, Warden, Petitioner
v.
Floyd Perkins
Docketed: July 27, 2012
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (09-1875)
Decision Date: March 1, 2012
Rehearing Denied: April 26, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 25 2012	Petition for a writ of certiorari filed. (Response due August 27, 2012)
Aug 9 2012	Order extending time to file response to petition to and including September 26, 2012.
Aug 27 2012	Brief amici curiae of Alabama, et al. filed.
Sep 26 2012	Brief of respondent Floyd Perkins in opposition filed.
Oct 9 2012	Reply of petitioner Greg McQuiggin, Warden filed. (Distributed)
Oct 10 2012	DISTRIBUTED for Conference of October 26, 2012.
Oct 29 2012	Petition GRANTED.
Dec 13 2012	Joint appendix filed. (Statement of costs filed)
Dec 13 2012	Brief of petitioner Greg McQuiggin, Warden filed.
Dec 18 2012	SET FOR ARGUMENT Monday, February 25, 2013.
Dec 20 2012	Brief amici curiae of Alabama, et al. filed.
Dec 21 2012	The time to file respondent's brief on the merits is extended to and including January 18, 2013.
Jan 4 2013	CIRCULATED.
Jan 8 2013	Record from the U.S.C.A. for 6th Circuit is electronic.
Jan 15 2013	Record from the U.S.D.C. for Western District of Michigan is electronic.
Jan 18 2013	Brief of respondent Floyd Perkins filed. (Distributed)
Jan 25 2013	Brief amicus curiae of The Innocence Network filed. (Distributed)
Jan 25 2013	Brief amici curiae of former and current law enforcement officials filed. (Distributed)
Feb 15 2013	Reply of petitioner Greg McQuiggin, Warden filed. (Distributed)
Feb 25 2013	Argued. For petitioner: John J. Bursch, Michigan Solicitor General, Lansing, Mich. For respondent: Chad A. Readler, Columbus, Ohio.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a one-year statute of limitations for filing a habeas petition. In *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010), this Court affirmed that a habeas petitioner is entitled to equitable tolling of that one-year period "only if he shows: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." This petition presents two recurring questions of jurisprudential significance involving equitable tolling under AEDPA that have divided the circuits:

1. Whether there is an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that "prevented timely filing" of a habeas petition.

2. If so, whether there is an additional actual-innocence exception to the requirement that a petitioner demonstrate that "he has been pursuing his rights diligently."

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Greg McQuiggin, Warden of a Michigan correctional facility. The Respondent is Floyd Perkins, an inmate.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–23a, is reported at 670 F.3d 665. The opinion of the District Court, App. 25a–33a, is not reported but is available at 2009 WL 1788377. The opinion of the Michigan Court of Appeals, App. 42a–46a, is not reported.

JURISDICTION

The Sixth Circuit Court of Appeals' judgment was entered on March 1, 2012, App. 24a. A petition for rehearing was denied on April 26, 2012, App. 47a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214 (codified at 28 U.S.C. § 2241 *et seq.*), provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

INTRODUCTION

A habeas petitioner who files his petition beyond AEDPA's one-year limitations period is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010). *Holland* recognized that attorney negligence can, in some instances, excuse an untimely filing if the petitioner has pursued his rights diligently. This petition asks whether there is an actual-innocence exception to both the prevented-timely-filing and diligent-pursuit requirements.

Respondent Perkins, a convicted murderer, filed his habeas petition on the basis of "new evidence" allegedly proving his innocence. The evidence consisted of three affidavits that purportedly corroborate the defense theory the jury rejected. Perkins filed his petition not one but six years after obtaining the last affidavit. Nonetheless, the Sixth Circuit allowed Perkins to proceed based on equitable tolling.

The first question is whether an actual-innocence claim is a proper basis for equitably tolling AEDPA's one-year limitations period absent an extraordinary circumstance that "prevented timely filing." The Sixth Circuit answered this question yes, following decisions of the Ninth, Tenth, and Eleventh Circuits. App. 8a–13a. That holding renders AEDPA's "new evidence" provision a nullity, see 28 U.S.C. § 2244(d)(1)(D) (allowing a habeas petition up to one year following the discovery of new evidence), and it deepens a conflict with the First, Fifth, and Seventh Circuits.

The second question is whether a habeas petitioner asserting actual innocence must show that he exercised diligence as a prerequisite to equitable tolling. The Sixth Circuit said no, following decisions of the Ninth, Tenth, and Eleventh Circuits, App. 19a–20a. That holding contravenes AEDPA's plain language for habeas claims based on new evidence (§ 2244(d)(1)(D) restarts the one year period from the date new evidence "could have been discovered through the exercise of due diligence"), conflicts directly with decisions of the Seventh and Eighth Circuits, and conflicts indirectly with a Third Circuit decision. The Sixth Circuit's conclusion also conflicts with this Court's statement in *Holland* that a habeas petitioner invoking equitable tolling must show "that he has been pursuing his rights diligently." 130 S. Ct. at 2562.

Because only this Court can resolve the mature circuit conflicts with respect to both of these recurring issues, the petition for certiorari should be granted and the Sixth Circuit's habeas ruling reversed.

STATEMENT OF THE CASE

A. AEDPA's one-year limitations period

Section 2244(d)(1) creates a one-year limitations period for filing a habeas petition. That year begins to run from the latest of (A) the date the conviction became final; (B) the date a state-created filing impediment was removed; (C) the date this Court created a new constitutional right deemed retroactive on collateral review; or (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1).

Section 2244(d)(1)(D)'s discovery rule allows for claims of innocence where new evidence, such as DNA, does not materialize for many years (even decades) after conviction. But by requiring petitioners to bring such claims within one year after the discovery, § 2244(d)(1)(D) promotes the public's interest in the prompt assertion of habeas claims, the state's interest in litigating issues while they are still fresh, and the convicted defendant's interest in securing release if warranted by the newly discovered evidence.

B. The murder conviction

A Genesee County jury convicted Respondent Perkins of murder for brutally stabbing Rodney Henderson to death while walking down a wooded trail in Flint, Michigan. In finding Perkins guilty, the jury accepted the testimony of Damarr Jones, an eye witness to the murder. The jury rejected Perkins' claim that Jones was lying and was himself the murderer.[1]

The Michigan trial court sentenced Perkins to life in prison. The Michigan Court of Appeals affirmed, App. 42a–46a, and the Michigan Supreme Court denied leave to appeal on January 31, 1997, App. 41a.

C. Perkins' untimely habeas petition

Absent the discovery of new evidence, AEDPA required Perkins to file his petition for habeas corpus no later than May 5, 1998. 28 U.S.C. § 2244(d)(1)(A).

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[1] The Sixth Circuit panel said that what happened "is in dispute." App. 3a. The panel's statement ignores that the jury found Perkins guilty beyond a reasonable doubt.

He did not. Instead, Perkins waited more than 10 years to file, until June 13, 2008.

To circumvent § 2244(d)(1)'s one-year limitations period, Perkins claimed actual innocence based on three affidavits, one each from his sister, a friend's younger brother, and a dry-cleaning clerk. App. 4a. None of the affidavits relied on newly-discovered DNA or comparable evidence. Instead, the affidavits purported to corroborate the same defense ("Jones did it") that the jury rejected. And Perkins admits that he knew about his sister's statement at the time of trial.

The three affidavits were signed on January 30, 1997, March 16, 1999, and July 16, 2002. App. 4a. Thus, even under a "new evidence" theory, the AEDPA one-year limitations period expired on July 16, 2003. App. 4a. But Perkins did not file the instant petition until 2008, almost five years later. App. 4a.

D. District Court proceedings

The District Court denied Perkins' petition because the affidavits failed to satisfy the strict standard for proving actual innocence: new, reliable evidence that demonstrates factual innocence, not mere legal insufficiency. App. 30a (citing *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995)).

Alternatively, the District Court said that the Sixth Circuit's decision in *Souter* v. *Jones*, 395 F.3d 577 (6th Cir. 2005)—which allowed equitable tolling of § 2244's one-year limitations period—does not mean that an actual-innocence claim tolls the limitations period indefinitely. App. 31a. "[T]he Supreme Court has clearly indicated that equitable tolling, regardless

of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights." App. 31a (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Accord *Holland*, 130 S. Ct. at 2562 (equitable tolling requires petitioner's diligent pursuit).

E. Sixth Circuit ruling

The Sixth Circuit reversed. Relying on its previous decision in *Souter*, the Sixth Circuit first held that Perkins' "gateway actual innocence claim" allowed him to present his habeas petition "as if he had not filed it late." App. 8a. The Sixth Circuit said that nothing in this Court's *Holland* analysis calls *Souter* into question. App. 9a–11a. That is because *Holland* "does not indicate that a credible claim of actual innocence is not . . . an 'appropriate' case" for tolling. App. 11a. The Sixth Circuit so held even though *Holland* specifically tied equitable tolling to an extraordinary circumstance that "*prevented timely filing*," a prerequisite that does not exist when a habeas petitioner simply asserts actual innocence but no reason for filing many years after discovering the purported new evidence. The Sixth Circuit was satisfied that the "majority of circuits that have considered the actual-innocence gateway post-*Holland* agree" with *Souter*. App. 12a.

Next, the Sixth Circuit, again relying on *Souter*, held that Perkins need not even prove reasonable diligence to invoke equitable tolling. App. 16a. The Sixth Circuit acknowledged that this Court's language in *Holland* regarding diligence "is seemingly at odds" with *Souter*. App. 14a. But the court distinguished *Holland* and *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005), because neither case involved an actual-

innocence claim. App. 16a. "In fact, the Supreme Court has never required reasonable diligence to be shown when seeking equitable tolling due to actual innocence," said the court. App. 16a.

Finally, the Sixth Circuit declared that whether Perkins "is actually innocent is not for us to decide." App. 20a. The court rejected the District Court's cursory treatment of this issue "so that the district court may *fully* consider whether Perkins asserts a credible claim of actual innocence." App. 21a (emphasis added).

REASONS FOR GRANTING THE PETITION

I. The petition should be granted to resolve a deep and mature circuit conflict regarding the availability of equitable tolling when a habeas petitioner asserts an actual-innocence claim but cites no extraordinary circumstance that "prevented timely filing."

A. The circuits are deeply divided over this question, and the decision below conflicts with this Court's decision in *Holland*.

The first question presented is whether equitable tolling is even available when a habeas petitioner claims actual innocence but provides no reason justifying the untimely filing. On the Sixth Circuit's side are decisions of the Ninth, Tenth, and Eleventh Circuits. App. 12a, citing *Lee* v. *Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) (a "petitioner who makes [a credible showing of actual innocence] may pass through the *Schlup* gateway and have his otherwise

time-barred claims heard on the merits"); *Sandoval* v. *Jones*, 447 Fed. Appx. 1, 4–5 (10th Cir. 2011) ("We recognize, of course, that § 2244(d)'s procedural bar does not extend to preclude this court from entertaining claims of actual innocence"); *San Martin* v. *McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011) ("A court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned.").

Opposite the Sixth Circuit's conclusion, though absent from its opinion, are the First, Fifth, and Seventh Circuits. *David* v. *Hall*, 318 F.3d 343, 347 (1st Cir. 2003) ("Nothing is changed here by David's claim of actual innocence . . . . [T]he statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch."); *Cousin* v. *Lensin*, 310 F.3d 843, 849 (5th Cir. 2002) (claims of innocence do not justify equitable tolling of § 2244(d)'s limitations period); *Escamilla* v. *Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005) ("Petitioners claiming to be innocent . . . must meet the statutory requirement of timely action.").

Thus, depending on whether his incarceration is in the Sixth, Ninth, Tenth, or Eleventh Circuits, on the one hand, or the First, Fifth, or Seventh Circuits, on the other, a habeas petition claiming both actual innocence and invoking equitable tolling will experience a different result.

It is also difficult to reconcile the Sixth Circuit's conclusion with *Holland*, though the Sixth Circuit strove mightily to do so. App. 14a–18a. *Holland* "made clear" that a petitioner is entitled to equitable tolling only if he shows "'that some extraordinary circumstance stood in his way *and prevented timely filing*.'" 130 S. Ct. at 2562, quoting *Pace*, 544 U.S. at 418 (emphasis added). An actual-innocence claim does not prevent timely filing. Certiorari is warranted.

B. A habeas petitioner claiming actual innocence must act promptly to assert that claim.

The answer to the first question presented is dictated by plain, statutory language. One of Congress's primary purposes for adopting AEDPA was to "compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances." *David*, 318 F.3d at 346 (citing 28 U.S.C. § 2244(d)(1)(A)–(D); H.R. Rep. No. 104–518, at 111 (1996)). "To bypass these restrictions for reasons other than those given in the statute could be defended, if at all, only for the most exigent reasons." *Id.*; accord *Holland*, 130 S. Ct. at 2560 (§ 2244(d) is subject to equitable tolling only in "appropriate cases"). Indeed, this Court has generally disallowed the actual-innocence rubric as an *independent* ground for habeas relief absent additional extraordinary circumstances, such as a capital case. See *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993).

Although this Court in *Holland* recognized that AEDPA's limitation periods may be generally subject

to equitable tolling, such tolling should not extend to an actual-innocence claim based on new evidence. That is because § 2244(d)(1)(D) already accounts for such a claim. As noted above, AEDPA's one-year limitations period does not begin to run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). If a habeas petitioner can assert equitable tolling, it renders § 2244(d)(1)(D) a nullity.

Significantly, § 2244(d)(1)(D)'s discovery rule allows for claims of innocence where new evidence (such as DNA) does not materialize for many years after conviction. But by requiring petitioners to bring such claims within one year after the discovery, § 2244(d)(1)(D) promotes the public's interest in the prompt assertion of habeas claims, an interest that grows over time and aligns entirely with the prisoner's interest. Ordinarily, a habeas grant leaves the state free to retry the petitioner. But that task becomes difficult to impossible "as memories fade, evidence disperses and witnesses disappear." *David*, 318 F.3d at 348. That is particularly true here, where Michigan secured Perkins' conviction more than a decade ago.

In other words, § 2244(d)(1)(D) opens the habeas filing window when a petitioner *could not have filed* his petition earlier based on the unavailability of exculpatory evidence. But "one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack." *David*, 318 F.3d at 348. As Judge Easterbrook put it, although § 2244 "leaves some (limited) room for equitable tolling, courts cannot alter the rules laid down in the

text." *Escamilla*, 426 F.3d at 872 (citation omitted). "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing. Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Id.*

Notably, § 2244(d) is not the only way that Congress addressed the issue of actual-innocence claims based on newly discovered evidence. Under 28 U.S.C. § 2244(b)(2)(B), Congress lifted AEDPA's prohibition on successive petitions where facts underlying a new claim would establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. In other words, there is no need for the courts to act in equity to provide relief for "actually innocent" habeas petitioners; Congress comprehensively dealt with the issue in § 2244. And Congress's intentional use of the actual-innocence concept in other AEDPA provisions creates a negative inference that Congress did not intend there to be an actual-innocence exception to § 2244(d). This Court should grant the petition and so hold.

II. The petition should be granted to resolve a deep and mature circuit conflict regarding the need to show reasonable diligence as a prerequisite to equitably toll AEDPA's limitations period when asserting an actual-innocence claim.

A. The Sixth Circuit's refusal to hold petitioners claiming actual innocence to a "due diligence" standard deepens an already mature circuit conflict.

The second question presented is whether equitable tolling of AEDPA's limitations period requires a habeas petitioner to show reasonable diligence. In considering this question, the Sixth Circuit recognized "two tracks of Supreme Court jurisprudence in tension with each other." App. 16a. As the Sixth Circuit explained, cases like *Holland* and *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005), "indicate that those seeking equitable tolling must, in general, pursue their claims with reasonable diligence." App. 16a. But a case like *House* v. *Bell*, 547 U.S. 518 (2006), "consider[s] actual innocence as a gateway to seek review of claims otherwise barred by procedural default, yet do not impose additional requirements."[2] The Sixth Circuit resolved these two tracks in favor of jettisoning a due-diligence requirement when a habeas petitioner claims actual innocence. App. 16a.

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[2] The Sixth Circuit opinion erroneously refers to *House* v. *Bell* as two separate cases standing for the same proposition, i.e., the cases of *House* and *Bell*. App. 16a.

The Sixth Circuit supported its conclusion with citations to three post-*Holland* decisions. App. 19a–20a. In *Lopez* v. *Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 1010), the Tenth Circuit held that "[i]n the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for brining constitutional claims, regardless of whether the petitioner demonstrates cause for the failure to bring these claims forward earlier." App. 19a–20a.

Similarly, the Eleventh Circuit, acknowledging *Holland*, "distinguished between equitable tolling based on reasonable diligence and extraordinary circumstances, and equitable tolling based on actual innocence." App. 19a, citing *San Martin* v. *McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011). The Eleventh Circuit said that a "court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." App. 19a, citing *San Martin*, 633 F.3d at 1267–68. The Ninth Circuit has made the same point. App. 19a, citing *Lee* v. *Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) ("As with equitable tolling based on diligence and extraordinary circumstances, we conclude that Congress intended for the actual innocence exception to apply to AEDPA's statute of limitations").

The Sixth Circuit described the circuits on this issue as "mostly" "in agreement." App. 19a. But the court could make that claim only by looking to post-*Holland* law. App. 19a–20a. The Sixth Circuit's narrow

view of the relevant precedents does not account for the fact that those circuits that require reasonable diligence to invoke equitable tolling based on actual innocence would likely view their precedents as *strengthened*, not diminished, following *Holland*'s reasonable-diligence holding.

For example, in *Flanders* v. *Graves*, 299 F.3d 974 (8th Cir. 2002), a habeas petitioner similarly filed a late petition and invoked actual innocence claim as the basis for equitable tolling. The Eighth Circuit held that a petitioner claiming equitable tolling of § 2244's limitation period based on an actual-innocence claim must show "that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." *Id.* at 978.[3] There is no reason to think the Eighth Circuit would change its mind in light of *Holland*.

The Seventh Circuit, in *Gildon* v. *Brown*, 384 F.3d 887 (7th Cir. 2004), followed the Eighth Circuit's decision. *Id.* at 887 ("We find the Eighth Circuit's analysis of this issue in *Flanders* v. *Graves*, to be persuasive."). See also *Miller* v. *New Jersey State Dep't of Corrections*, 145 F.3d 616, 618–19 (3d Cir. 1998) (in a case where the court did not describe the nature of the petitioner's habeas claim, the Third Circuit expressly held that equitable tolling of § 2244 requires proof that petitioner "exercised reasonable diligence in investigating and bringing the claims").

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[3] While the court declined to say that actual innocence can *never* be relevant to equitable tolling, *id.*, it limited such circumstances to those beyond the habeas petitioner's control, *id.* But in those circumstances, § 2244(d)(1)(D) would toll the limitations period and render equitable tolling unnecessary anyway.

In light of these conflicting circuit decisions, a habeas petition claiming both actual innocence and invoking equitable tolling will experience a different result depending on whether his incarceration is in the Sixth, Ninth, Tenth, or Eleventh Circuits, on the one hand, and the Third, Seventh, and Eighth Circuits, on the other hand. And all of the decisions recognizing an actual-innocence exception to the due-diligence requirement appear to conflict directly with this Court's admonition in *Holland*. The importance of the question presented and the uncertainty in the law that the split of authority creates counsel strongly in favor of granting the petition.

B. A habeas petitioner invoking equitable tolling must always prove reasonable diligence, even when asserting an actual-innocence claim.

On the merits, the Sixth Circuit's decision failed to wrestle with the tough question: there was no reason for Congress to create a *diligence*-based discovery rule for claims of actual innocence in § 2244(d)(1)(D) if a petitioner could simply circumvent the diligence requirement by invoking equity.

As this Court has held in the context of tolling civil-rights limitation periods, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr.* v. *Brown*, 147 U.S. 147, 151 (1984). That holding is consistent with the Court's recent statement in *Holland*; in fact, it is the prerequisite for equitably tolling all other AEDPA claims. See, e.g., *Whitley* v. *Senkowski*, 567 F. Supp. 2d 490, 496 (S.D. N.Y., 2008).

But if there is any doubt about whether an actual-innocence claim should create an exception to this diligence requirement in the habeas context, it is resolved by the statutory language. That is because the statute creates a one-year limitations period for the discovery of new evidence that runs from the date the evidence "could have been discovered through the exercise of due diligence." It makes no sense to create an equitable exception that negates the very precondition that Congress required for relief.

The Sixth Circuit did not address this plain-language problem. Instead, it articulated three other justifications for an unlimited equitable-tolling rule. Not one holds up under scrutiny.

First, the panel was wrong in assuming that there is a "tension" between *Holland*'s diligence requirement and the *House* v. *Bell* line of cases, which consider actual innocence as a "gateway" to review procedurally barred claims without imposing additional requirements. App. 16a. The reality is that the petitioners in the *House* line of cases diligently pursued their actual-innocence claims.

In contrast here, Perkins sat for over a decade on the evidence he now says establishes his innocence. Perkins' sister signed the first affidavit purportedly supporting Perkins' claim of actual innocence on January 30, 1997. Ronda Hudson Aff., App. 54a–55a. Perkins admits that her testimony was known to him at the time of trial. Perkins obtained his second affidavit on March 16, 1999. Desmond Louis Aff., App. 50a–53a. Perkins obtained a third affidavit, consistent with his sister's 1997 affidavit, on July 16, 2002. Linda Fleming Aff., App. 48a–49a. But Perkins did not file

his habeas petition until June 13, 2008, 11 years after he obtained his sister's affidavit, and six years after he obtained the final affidavit.

Second, the Sixth Circuit was wrong to assume that requiring Perkins to act diligently before allowing him to invoke equity creates an "absurd result." App. 17a. The panel said that it was "unclear" why equity would allow an actually-innocent prisoner to overcome a procedural bar without showing more, while an untimely habeas petitioner would have to show due diligence. App. 17a. But the answer lies in § 2244(d)(1)(D)'s text, which specifically imports traditional equitable principles by requiring diligence.

In the Supreme Court cases on which the panel relied, App. 19–20a, the prisoners seeking to overcome a procedural bar had all filed timely habeas petitions. Those prisoners had already established due diligence. The Sixth Circuit did not cite a single case where the prisoner waited 11 years to unveil his "evidence" supporting equitable relief. Equity principles do not allow Perkins to sit on his rights for a decade before asking the courts to exercise their equitable powers, and no actually innocent defendant would do so.

Third, this Court's command in *Holland* (a habeas petitioner claiming equitable tolling must always show "that he has been pursuing his rights diligently," 130 S. Ct. at 2562) does not render the gateway-of-actual-innocence theory "redundant." App. 15a. The panel said that "the requirement [of reasonable diligence] has the effect of reducing actual innocence claims to only those which are timely under § 2244(d)(1)(D)." App. 15a. But it is actually the exact opposite: the Sixth Circuit's holding renders § 2244(d)(1)(D)

redundant. There is no reason to dispense with the diligence requirement that Congress required.

Perkins, of course, has never argued that he was diligent in waiting six years from the date of his last affidavit until filing his habeas petition, nor could he. There is no reasonable excuse for such a delay. It is reasonable to expect that a prisoner who has legitimate proof of innocence will petition promptly rather than wait 11 (or even six) years to seek habeas relief. All parties to a habeas proceeding have an interest in resolving claims of innocence as soon as they become known. This Court should vacate the Sixth Circuit's decision and hold that all habeas petitioners invoking equitable tolling must prove reasonable diligence, even those claiming actual innocence.

III. The issues presented are of national importance and require prompt resolution.

The numerous pre- and post-*Holland* Circuit decisions show that both issues presented are recurring and creating unnecessary district-court litigation. The Court should grant the petition and resolve that conflict now.

In opposing rehearing en banc in the Sixth Circuit, Perkins argued that the Circuits' conflict was illusory, because the Circuit decisions in conflict with the Sixth Circuit were issued pre-*Holland*. That argument is a red herring.

Regarding the first issue presented, every Circuit holding that there is no actual-innocence exception to the prevented-timely-filing requirement *assumed* that equitable tolling was available in some circumstances.

David, 318 F.3d 346 ("many circuits have held or assumed that equitable tolling is [generally] available [under § 2244], and we will proceed here on that *arguendo* assumption"); *Escamilla*, 426 F.3d at 872 (§ 2244 "leaves some (limited) room for equitable tolling"); *Cousin*, 310 F.3d at 847–48 ("AEDPA's limitations provision, like any statute of limitations, may be equitably tolled"). The fact that *Holland* recognized the availability of equitable tolling in an AEDPA context would not change the result in these cases.

Regarding the second issue presented, there is nothing in *Holland* that would suggest a diligence requirement is waived simply because a habeas petitioner presents suspect fact affidavits and claims innocence. To the contrary, *Holland* admonishes that a habeas petitioner invoking equitable tolling must show "that he has been pursuing his rights diligently." 130 S. Ct. at 2562. Yet several post-*Holland* Circuits, including the Sixth, refuse to follow *Holland*'s command.

Further delay before resolving the conflict has significant separation-of-power implications. When the judiciary allows untimely habeas petitions based on nothing more than the petitioner's flimsy claims of innocence, the judicial branch abrogates, through equity, the one-year AEDPA limitations period that Congress constructed. Here, for example, Perkins does not point to new DNA or similar evidence that demonstrates his actual innocence. He simply presents old affidavits containing a theory of the case that the jury rejected. This is precisely the kind of stale filing, based on questionable evidence, that Congress sought to keep out of the federal courts altogether when

adopting AEDPA. This Court's intervention is required to enforce that Congressional limit in the Sixth and several other Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 12a0062p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLOYD PERKINS,
Petitioner-Appellant,
v. No. 09-1875
G. MCQUIGGIN,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Michigan at Marquette.
No. 08-00139—Robert Holmes Bell, District Judge.

Argued: October 13, 2011

Decided and Filed: March 1, 2012

Before: MOORE and COLE, Circuit Judges; BECKWITH, District Judge.*

COUNSEL

ARGUED: Allison E. Haedt, JONES DAY, Columbus, Ohio, for Appellant. Mark G. Sands, OFFICE OF THE MICHIGAN ATTORNEY

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* The Honorable Sandra S. Beckwith, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Allison E. Haedt, Chad A. Readler, JONES DAY, Columbus, Ohio, for Appellant. Mark G. Sands, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

COLE, J., delivered the opinion of the court, in which MOORE, J., and BECKWITH, D. J., joined. BECKWITH, D. J. (pp. 16–17), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge. Floyd Perkins, the petitioner-appellant, asks this Court to determine whether a credible claim of actual innocence, without more, warrants equitable tolling of AEDPA's statute of limitations. This Court has previously held that it does, but the Warden asserts that a recent Supreme Court decision places an additional burden upon such prisoners. Specifically, the Warden argues, that even if a prisoner petitioning for a writ of habeas corpus makes a credible claim of actual innocence, the district court may not assess the merits of the claim unless the prisoner also pursued the writ with reasonable diligence. Because we find that such a reading would render the concept of equitable tolling nugatory, we REVERSE the judgment of the district court and REMAND for proceedings consistent with this opinion.

I. BACKGROUND

On March 4, 1993, Perkins attended a house party in Flint, Michigan, with Damarr Jones and Rodney

Henderson. The three men left the party together, but what happened next is in dispute. Jones testified that as they walked down a wooded trail towards another house party, Perkins pulled out a knife and began stabbing Henderson. Perkins maintains that after leaving the party, the three men went to a store to buy alcohol and cigarettes, but that Henderson and Jones left before Perkins finished paying. He claims that he later saw Jones standing under a streetlight with bloody clothing. Neither Perkins nor Jones disputes that at some point later in the evening, they arrived at another friend's home to play video games.

A Michigan jury convicted Perkins of fatally stabbing Henderson after hearing Jones testify. After exhausting his appeals, Perkins's conviction became final on May 5, 1997. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Perkins needed to file his petition for a writ of habeas corpus by May 5, 1998. *See* 28 U.S.C. § 2244(d)(1)(A). He did not.

On June 13, 2008, Perkins filed his petition for a writ of habeas corpus in the district court, raising sufficiency of the evidence, jury instruction, trial procedure, prosecutorial misconduct, and ineffective assistance of counsel claims of error. The magistrate judge recommended the petition be denied as barred by the statute of limitations. Perkins objected, arguing that the petition should be governed by AEDPA's "new evidence" statute of limitations, which extends the statute of limitations to one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

In support of this objection, Perkins introduced three previously unpresented affidavits that alluded to his innocence and to the guilt of Jones, the prosecution's eyewitness. An affidavit from Perkins's sister, Ronda Hudson, stated that the affiant heard that Jones had bragged about stabbing Henderson and taking his clothes to the cleaners after the murder. An affidavit from Demond Louis, the younger brother of one of Perkins's friends, stated that Jones admitted, on the night of the murder, to killing Henderson. Louis also noticed Jones wearing orange shoes, orange pants, and a colorful shirt, and that there was blood on his shoes and pants. Finally, an affidavit from Linda Fleming, a dry-cleaning clerk, stated that a man matching Jones's description came in around the date of the murder wanting to know if blood stains could be removed from clothing that matched the description given in Louis's affidavit.

These affidavits were signed on January 30, 1997, March 16, 1999, and July 16, 2002, respectively. AEDPA's "new evidence" statute of limitations expired on July 16, 2003, one year after the last affidavit was signed. Perkins filed the instant petition in 2008, almost five years after the statute of limitations had run. Perkins, drawing upon this Court's precedent, requested that AEDPA's statute of limitations be equitably tolled because he is actually innocent of murdering Henderson. The district court denied the request because Perkins's new evidence was not of the sort needed to pursue an actual innocence claim. "His alleged newly discovered evidence was substantially available to him at trial" and the evidence pointed to the same theory that Perkins had already

unsuccessfully argued at trial: that the prosecution's lead witness was framing him.

The district court went further, and found that even if Perkins had put forth the type of evidence that would satisfy the actual innocence standard, he had not pursued his claims with reasonable diligence. Drawing upon the Supreme Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the district court determined that a petitioner who seeks to equitably toll a statute of limitations must demonstrate that he has been diligent in pursuing his rights. Perkins, however, waited almost six years after the last affidavit was signed to file his petition in the district court. On June 18, 2009, the district court adopted the magistrate judge's report, denied Perkins's petition for relief, and denied Perkins a certificate of appealability to appeal the judgment to this Court.

Perkins filed a motion requesting a certificate of appealability with this Court on September 14, 2009. On February 24, 2010, this Court, finding that "jurists of reason could debate the district court's conclusion that reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling," granted the certificate of appealability request. The certificate of appealability identified this issue alone for review. This appeal followed.

II. ANALYSIS

The district court's dismissal of a petition for a writ of habeas corpus for failing to comply with 28 U.S.C. § 2244's statute of limitations is reviewed de novo. *Cook v. Stegall*, 295 F.3d 517, 519 (6th Cir. 2002). Perkins asserts that the district court improperly assessed his

actual innocence claim for purposes of tolling AEDPA's statute of limitations, and that the district court erroneously assumed that a petitioner with a credible claim of actual innocence must additionally prove that he acted with reasonable diligence for such tolling to occur.

A. Perkins's claim of actual innocence

For Perkins to have his habeas petition heard on the merits in federal court, he must first persuade the district court that AEDPA's statute of limitations, which has already run, should be equitably tolled in his favor. To do this, he must show that he is factually innocent of killing Henderson, not just that there was insufficient evidence to convict him. The district court stated that Perkins's delay in filing his petition precluded further review. It also found that Perkins's new evidence was not of the sort needed to pursue a claim of actual innocence, though its analysis on this point was limited to two sentences. We cannot say that the district court's analysis on this issue is a sufficient basis on which to rest our review, such that we need not reach the issue specified in the certificate of appealability.

If a state prisoner's habeas petition is denied in federal district court, "the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b). The certificate of appealability may be issued only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court's denial of habeas relief is on procedural grounds, the petitioner must show that "jurists of

reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The certificate of appealability issued to Perkins identified only the issue of whether reasonable diligence is a prerequisite for equitably tolling AEDPA's statute of limitations for review.

Our review of a petitioner's § 2254 motion is limited to those issues specified in the certificate of appealability. *Harris v. Haeberlin*, 526 F.3d 903, 908 n.1 (6th Cir. 2008); *see also Willis v. Jones*, 329 F. App'x 7, 12 (6th Cir. 2009) ("[A certificate of appealability] only vests jurisdiction to consider issues specified in the certificate."). Close to half of Perkins's opening brief is dedicated to proving that he is innocent. Perkins asserts that we should consider his actual innocence claim because it is "part and parcel" of his overall tolling claim. *Calvert v. Wilson*, 288 F.3d 823, 838 n.4 (6th Cir. 2002) (Cole, J., concurring). A closer reading of *Calvert* belies this argument. In *Calvert*, we reviewed a claim not expressly granted in the certificate of appealability because the substantive argument, whether the district court's error was harmless, could not be analyzed without assessing whether the respondent waived the argument. *Id.* ("This [certificate of appealability] argument clearly lacks merit, as the propriety of considering harmless error is certainly part and parcel of Calvert's Confrontation Clause claim.").

Perkins asserts, without more, that the merits of the actual innocence claim are probative as to other

issues in this appeal. We do not agree. Perkins's innocence has no bearing on the reasonable diligence question, the only question certified by the certificate of appealability. The actual innocence claim is not "part and parcel" of the reasonable diligence question, and only a review of the latter is before us.

B. Actual innocence as a valid basis for equitable tolling

AEDPA's statutes of limitation prescribe when state prisoners may apply for writs of habeas corpus in federal court. The statutes of limitation are not jurisdictional, and do not require courts to dismiss claims as soon as the "clock has run." *Day v. McDonough*, 547 U.S. 198, 208 (2006). In *Souter v. Jones*, we held that "where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims." 395 F.3d 577, 602 (6th Cir. 2005) This "gateway actual innocence claim" does not require the granting of the writ, but instead permits the petitioner to present his original habeas petition as if he had not filed it late. *Id.* at 596.

The Warden asks us to reconsider *Souter*'s holding that actual innocence is a valid basis for equitably tolling AEDPA's statute of limitations in light of the Supreme Court's recent decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010). Sixth Circuit Rule 206(c) requires reported panel opinions to be binding on subsequent panels absent en banc review or when "an inconsistent decision of the United States Supreme

Court requires modification of the earlier panel decision." *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (internal quotation marks and citations omitted). A close reading of *Holland* confirms that *Souter* is still binding on this Court.

In *Holland*, the petitioner repeatedly attempted to contact his attorney to ensure that his habeas petition would be filed in time. 130 S. Ct. at 2559. His attorney failed to do so, and the district court and the Eleventh Circuit Court of Appeals both found that "the facts did not warrant equitable tolling and that consequently Holland's petition was untimely." *Id.* Although the petition for certiorari specifically addressed the professional misconduct issue, the Supreme Court could not resolve that issue without first resolving whether the ineffective assistance of the petitioner's attorney warranted equitable tolling of AEDPA's statute of limitations.

The Warden claims that the Supreme Court's decision in *Holland* is the type of inconsistent opinion that justifies revisiting our decision in *Souter*. The Warden asserts that AEDPA's statute of limitations already includes actual innocence claims when two different considerations are taken into account. First, when a new factual predicate for a habeas claim is discovered, the petitioner has an additional year to present his petition, even if the original one year period has run. 28 U.S.C. § 2244(d)(1)(D) ("The limitation period shall run from . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."). Next, claims of actual innocence must be based on "new reliable evidence." *Schlup v. Delo*, 513

U.S. 298, 324 (1995). Taken together, the Warden argues that Congress must have contemplated actual innocence claims when it drafted this section.

This argument is unpersuasive. The Supreme Court has repeatedly cautioned against finding that non-jurisdictional federal statutes of limitation *are not* subject to equitable tolling, absent clear congressional command. *Holland*, 130 S. Ct. at 2560. Even if a statute were to suggest that equitable tolling is inapplicable, such statutory implications do not displace the courts' equitable authority; such displacement should only occur when it is clear that Congress intended to do so. *Id.* The inference of congressional intent that the Warden urges is not the sort of "clearest command" that the Supreme Court requires to displace equitable authority. *See Holland*, 130 S. Ct. at 2560- 61.

The *Holland* Court identified two instances in which the presumption for equitable tolling has been overcome. *Id.* at 2561 (citing *United States v. Brockamp*, 519 U.S. 347 (1997); *United States v. Beggerly*, 524 U.S. 38 (1998)). In *Brockamp*, taxpayers sought federal tax refunds several years after the Internal Revenue Code's statute of limitations permitted such requests. *Brockamp*, 519 U.S. at 348. The IRC's "unusually emphatic" language that "reiterate[d] its limitations several times in several different ways" made clear that Congress truly did not intend for taxpayers to be able to seek refunds after the applicable period expired. *Id.* at 350-51. In *Beggerly*, a landowner's successor-in-interest sought to quiet title to property after the Quiet Title Act's ("QTA") twelve-year limitation period had run. 524

U.S. at 41-42. The Supreme Court found the nature of the QTA's time period to be "unusually generous" and that landowners needed a firm statute of limitations in quiet title actions. *Id.* at 48-49. None of the concerns the Supreme Court considered in *Brockamp* or *Beggerly*—emphasis in language, generosity of limitations periods, or prejudice to opposing parties—are implicated when considering whether to subject AEDPA's statute of limitations to equitable tolling.

Simply put, nothing in *Holland* calls our analysis in *Souter* into question. "While it is true that Congress included an actual innocence exception to the procedural bars on successive habeas petitions and evidentiary hearings but not to the one-year limitations period, that does not give rise to the negative implication that the absence of an exception was intended." *Souter*, 395 F.3d at 598. Indeed, actual innocence as a basis for equitable tolling of a statute of limitation was firmly part of the post-conviction relief jurisprudence when Congress enacted AEDPA, and there is a presumption that "Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence." *Id.* (citing *Young v. United States*, 535 U.S. 43, 49-50 (2002)). The Warden provides no reason why this presumption should be upset. "[L]ike all 11 Courts of Appeals that have considered the question, [the Supreme Court held] that [AEDPA] is subject to equitable tolling in appropriate cases." *Holland*, 130 S. Ct. at 2560. *Holland* does not indicate that a credible claim of actual innocence is not such an "appropriate" case without a series of illogical inferential leaps.

The majority of other circuits that have considered the actual innocence gateway post-*Holland* agree.[1] *See Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) ("[A] petitioner who makes [a credible showing of actual innocence] may pass through the *Schlup* gateway and have his otherwise time-barred claims heard on the merits."); *Sandoval v. Jones*, 447 F. App'x 1, 4-5 (10th Cir. 2011) ("We recognize, of course, that § 2244(d)'s procedural bar does not extend to preclude this court from entertaining claims of actual innocence."); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011) ("A court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned.") (internal quotation

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[1] The Fifth Circuit held, post-*Holland*, that claims of actual innocence may not toll AEDPA's statute of limitations. *Henderson v. Thaler*, 626 F.3d 773 (5th Cir. 2010). *Henderson*, however, did not address factual innocence, but innocence from a sentence of death. It also did not analyze the question anew in light of the Supreme Court's language in *Holland*. Instead, the *Henderson* court cited to a 2000 case that purportedly held there to be no actual innocence exception. *Id.* at 780 (citing *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000)). *Felder*, however, held that the claim *of the petitioner in that specific case* was not so "rare and exceptional" as to warrant equitable tolling, since "many prisoners maintain they are innocent." *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). In a footnote, the *Felder* court even stated that "[the petitioner] has not made a *showing* of actual innocence . . . ." *Id.* at 171 n.8 (emphasis in original). The *Felder* court did not go so far as to state that credible claims of actual innocence may *never* equitably toll the statute of limitations. The Fifth Circuit's opinion in *Henderson* at best holds that contesting the applicability of the death penalty as a valid sentence is not a valid basis for equitably tolling AEDPA's statute of limitations.

marks omitted). We joined them. *Turner v. Romanowski*, 409 F. App'x 922, 926 (6th Cir. 2011) ("The actual innocence exception allows for equitable tolling if the petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial.") (internal quotation marks omitted).

The Supreme Court's decision in *Holland* is consistent with our precedent in *Souter*. The Warden cites no language in *Holland* that marks such a departure, and simply rehashes arguments that the respondent made, and that we rejected, in *Souter*. The state's drawing of inferences in both the text of AEDPA and the *Holland* decision runs counter to the Supreme Court's command to hesitate "before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland*, 130 S. Ct. at 2562. Ultimately, no language in *Holland* gives us any reason to doubt *Souter*'s continued viability.

C. Reasonable diligence as a precondition to relying on actual innocence

The Warden alternatively argues that *Holland* requires *Souter* to be modified to include a reasonable diligence requirement. In *Holland*, the Supreme Court stated explicitly that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 2562 (citing *Pace*, 544 U.S. at 418) (internal quotation marks omitted). The Warden argues that even if a credible claim of actual

innocence is a valid basis for equitably tolling AEDPA's statutes of limitation, *Holland* dictates placing the additional burden of proving reasonable diligence on such petitioners. But, the Warden's reading conflicts with another strain of Supreme Court jurisprudence in which petitioners who have procedurally defaulted their claims, though not due to a late filing, may have their claims heard by showing, without more, a credible claim of actual innocence. *See House v. Bell*, 547 U.S. 518 (2006) (default due to waiver of substantive claims in state postconviction proceeding); *Schlup*, 513 U.S. 298 (default due to failure to raise substantive claim on appeal of state postconviction motion); *see also In re Davis*, 130 S. Ct. 1 (2009) (mem); *Dretke v. Haley*, 541 U.S. 386 (2004).

Holland's language is seemingly at odds with our decision in *Souter* that allows for a petitioner to have AEDPA's one-year statute of limitations equitably tolled upon a credible claim of actual innocence without a showing of reasonable diligence. *Souter*, 395 F.3d at 601 n.16 ("We decline to adopt the approach . . . which imposes a requirement that the petitioner show . . . that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.") (internal quotation marks and citation omitted). In that same footnote, we went on to state that, "we decline to impose additional requirements upon a petitioner beyond those which the Supreme Court has set forth in its habeas corpus jurisprudence." *Id.* Analyzed together, the Warden contends that we ought to overrule our prior decision in *Souter* pursuant to Rule 206(c), since *Holland* appears to be an inconsistent Supreme Court opinion on the subject of whether both reasonable diligence and a

credible claim of actual innocence must be presented to equitably toll AEDPA's statutes of limitation.

This conclusion is, like much of habeas jurisprudence, not that simple. Requiring reasonable diligence effectively makes the concept of the actual innocence gateway redundant, since petitioners only seek equitable tolling when they were not reasonably diligent in complying with § 2244(d)(1)(D). We made this point clear in *Souter*:

> The requirement [of reasonable diligence] has the effect of reducing actual innocence claims to only those which are timely under § 2244(d)(1)(D), the new evidence provision. That provision states the one-year limitations period begins to run from the date on which the new factual predicate "could have been discovered through the exercise of due diligence." § 2244(d)(1)(D). . . . [This requirement] would not cover situations as in this case where the petitioner had collected sufficient evidence to demonstrate a credible claim of actual innocence but failed to file within the one-year limitations period.

Id. All credible claims of actual innocence, per *Schlup*, must be based on new reliable evidence. Such evidence implicates the section quoted above. It is only those claims outside of that one-year period that require equitable tolling.

Holland cites *Pace*, 544 U.S. 408, as the basis for its conclusion that "a petitioner is entitled to equitable

tolling only if he shows . . . that he has been pursuing his rights diligently . . . ." *Holland*, 130 S. Ct. at 2562 (internal quotation marks omitted). In *Pace*, the Supreme Court decided that the petitioner could not equitably toll AEDPA's statute of limitations because he did not advance "his claims within a reasonable time of their availability" and he sat "on his rights for years" before filing his state postconviction relief application. *Pace*, 544 U.S. at 419. But, neither *Holland* nor *Pace* involved claims of actual innocence, and so requiring reasonable diligence in those situations does not trigger the internal redundancy we described in *Souter*. In *Pace*, the petitioner requested equitable tolling because "state law and [federal] exhaustion law created a trap . . . ." *Pace*, 544 U.S. at 418. In *Holland*, the claim for equitable tolling centered around attorney error. *Holland*, 130 S. Ct. at 2563. In fact, the Supreme Court has never required reasonable diligence to be shown when seeking equitable tolling due to actual innocence.

This puts two tracks of Supreme Court jurisprudence in tension with each other. Cases like *Holland* and *Pace* indicate that those seeking equitable tolling must, in general, pursue their claims with reasonable diligence. Cases like *House* and *Bell* consider actual innocence as a gateway to seek review of claims otherwise barred by procedural default, yet do not impose additional requirements. Resolving this tension requires us either to treat all equitable tolling cases the same, regardless of the presence of an actual innocence claim, or to treat all actual innocence claims the same, regardless of the reason for the procedural default. Given the Supreme Court's rich jurisprudence protecting those that may be wrongfully incarcerated,

we adopt the latter view. *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

Adopting the Warden's interpretation of *Holland* would permit an absurd result: petitioners could seek post-conviction review, even if their claim is otherwise procedurally defaulted, if they can make a credible showing of actual innocence and the basis of their default is not the statute of limitations. If the default is based on the statute of limitations, then such petitioners would also need to show reasonable diligence in order to seek review. The Warden makes no argument as to why such disparate standards ought to be applied based on the nature of the procedural default, which makes this interpretation troubling. As we stated in *Souter*, when considering whether actual innocence claims ought to be analyzed in a similar light post-AEDPA, "[a]bsent evidence on Congress's contrary intent, there is no articulable reason for treating habeas claims barred by the federal statute of limitations differently." *Souter*, 395 F.3d at 599. It is unclear why equity permits an actually innocent petitioner to pursue his petition if his default is based on state court exhaustion principles, but that same petitioner could not do so without proving reasonable diligence if the statute of limitations is the basis of default. There is little reason to believe that the Supreme Court values statutes of limitations over other procedural bars in this way. The more natural reading, in line with the Supreme Court's precedent, is

that all credible actual innocence claims are treated the same.

Congress passed AEDPA to streamline the federal habeas review process "without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law . . . ." *Holland*, 130 S. Ct. at 2562. Such prior law ensured that those who are actually innocent should be granted the ability to pursue postconviction relief regardless of procedural default. *See Schlup*, 513 U.S. at 325 ("Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."); *Sawyer v. Whitney*, 505 U.S. 333, 351 (1992) (Blackmun, J., concurring) ("[The Supreme Court] consistently has acknowledged that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness."); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) ("Federal courts retain the authority to issue the writ . . . .when a constitutional violation probably has caused the conviction of one innocent of the crime."); *Dugger v. Adams*, 489 U.S. 401, 414 (1989) ("[H]abeas review of a defaulted claim is available, even absent cause for default, if the failure to consider the claim would result in a fundamental miscarriage of justice.") (internal quotation marks omitted). If AEDPA is truly meant to be in harmony with pre-AEDPA law in those specific situations in which the Supreme Court is silent, it cannot be inferred that the language in *Holland* places an additional burden of proving reasonable diligence on Perkins.

Almost all other circuit courts have not yet analyzed whether, post-*Holland*, reasonable diligence is a prerequisite for equitably tolling AEDPA's statute of limitations based on a credible claim of actual innocence.[2] Many have come close, and they seem mostly to be in agreement. In *San Martin*, the Eleventh Circuit distinguished between equitable tolling based on reasonable diligence and extraordinary circumstances, and equitable tolling based on actual innocence. 633 F.3d at 1267-68. While acknowledging that *Holland* required reasonable diligence and extraordinary circumstances in order to equitably toll AEDPA's statute of limitations, it noted that "[a] court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." *Id.* (internal quotation marks omitted). The Ninth Circuit made a similar distinction. *Lee*, 653 F.3d at 934 ("As with equitable tolling based on diligence and extraordinary circumstances, we conclude that Congress intended for the actual innocence exception to apply to AEDPA's statute of limitations.") (citations omitted). The Tenth Circuit

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[2] The Third Circuit recently assumed, in dictum, that a petitioner seeking to toll AEDPA's statute of limitations with a credible claim of actual innocence "would still have the burden of demonstrating . . reasonable diligence in bringing his claim." *Reed v. Harlow*, 2011 WL 4914869, at *2 n.2 (3d Cir. Oct. 17, 2011). In support of this proposition, that court cites to its previous decision in *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616 (3d Cir. 1998). The petitioner in *Miller*, however, requested equitable tolling because he did not have access to his legal documents, not because he claimed to be innocent. *Miller* does not mention actual innocence.

went further, stating "[i]n the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing constitutional claims, regardless of whether the petitioner demonstrated cause for the failure to bring these claims forward earlier." *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010).[3]

III. CONCLUSION

Whether Perkins is actually innocent is not for us to decide. To be sure, the standard that he must meet is a high one, and it is only that "rare and extraordinary case" which merits such relief. Instead, this Court is tasked with determining whether petitioners who can make a credible showing of actual innocence must *also* make a showing of reasonable diligence in order to equitably toll AEDPA's statute of limitations and have their claim heard on the merits.

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[3] Because *Lopez* was decided about six months after *Holland*, but fails to cite to *Holland* in the opinion, the weight of this forceful language is somewhat limited. The Ninth Circuit recently questioned whether the phrase "equitable tolling" adequately describes the relief sought by petitioners like Perkins. *Lee*, 653 F.3d at 933-34 n.5. "We note that, in many cases, the phrase 'equitable tolling' is used in describing the use of equitable power to allow the untimely filing of a habeas petition in an actual innocence case. The more accurate characterization is 'equitable exception,' because equitable tolling involves different theoretical underpinnings." *Id.* Although we have used the phrase "equitable tolling" in cases such as *Souter*, the Ninth Circuit's semantic approach is not without merit, as it may assist courts in distinguishing among different standards for equitable relief.

While a number of courts, including the Supreme Court, have held that equitable tolling requires the petitioner to be reasonably diligent in pursuing his rights, none of those decisions analyze whether equitable tolling based on claims of actual innocence must be pursued in the same way. Given the Supreme Court's rich jurisprudence protecting the rights of the wrongfully incarcerated, petitioners who seek equitable tolling based on actual innocence should not be treated in the same way as those seeking equitable tolling because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons. For the foregoing reasons, the judgment of the district court is REVERSED, and the case is REMANDED so that the district court may fully consider whether Perkins asserts a credible claim of actual innocence.

CONCURRENCE

BECKWITH, District Judge, concurring. I write separately to voice a concern that this result not be interpreted to encourage the filing of stale petitions raising dubious claims of actual innocence.

As Justice O'Connor once noted, the principles that inform federal habeas jurisprudence are "finality, federalism, and fairness." *Withrow v. Williams*, 507 U.S. 680, 697 (1993) (concurring in part and dissenting in part). Any equitable exception to the procedural time limits imposed by Congress upon state habeas petitions implicates all three principles. Of course, actual innocence of a crime despite a conviction that has been affirmed on direct review raises fundamental

concerns about fairness to the petitioner, and in some cases the integrity of the judicial system. Thus a credible demonstration of actual innocence has traditionally been treated as sufficient, standing alone, to outweigh the interests of finality and federalism. As this Court recognized in *Souter v. Jones*, 395 F.3d 577, 600 (6th Cir. 2005), an exception to timeliness should be made in "... the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence." Indeed, I am of the view that a credible claim of actual innocence functions as a wholly separate and superceding circumstance that acts as an "equitable exception" to the statute of limitations. See *Lee v. Lampert*, 653 F.3d 929, 933 at n.5 (9th Cir.2011) (en banc).

However, federal habeas jurisprudence also demonstrates that such claims are rare, constituting a "narrow class of cases ... implicating a fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 314-315 (1995). *Schlup* held that in order to credibly claim actual innocence, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327 (emphasis added). Moreover, any such **new** evidence presented must be **reliable**, whether it consists of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence ... that was not presented at trial." *Id.* at 324. Thus a petitioner must present more than an existential possibility of innocence that rests on speculation, or present arguments that simply revisit minor discrepancies in trial testimony or evidence. A petitioner who can present new and reliable evidence of actual innocence under these exacting standards

should be entitled to a review of his claims of constitutional error without the untimeliness of his petition standing in the way. The result reached here should not be interpreted in any way to alter or lower these exacting standards.

I also believe that this result does not preclude any and all consideration of the timeliness of a petitioner's presentation of new evidence. The traditional judicial function of evaluating the credibility of witnesses and the quality and reliability of evidence often involves the consideration of when and how the evidence or witnesses came to light or were discovered by a petitioner. I wish to emphasize that nothing in our opinion should be understood to limit or cabin that traditional function.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 09-1875

FLOYD PERKINS,
Petitioner - Appellant,

v.

G. MCQUIGGIN,
Respondent - Appellee.

FILED
Mar 01, 2012
LEONARD GREEN, Clerk

Before: MOORE and COLE, Circuit Judges;
BECKWITH, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FLOYD PERKINS,
Petitioner, FILE NO. 2:08-CV-139
v. HON. ROBERT HOLMES BELL
G. McQUIGGIN,
Respondent.
_____/

OPINION ADOPTING REPORT AND RECOMMENDATION

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation ("R&R"), recommending that this Court deny the petition (docket #7). The matter presently is before the Court on Petitioner's objections to the R&R (docket #8). For the reasons that follow, Petitioner's objections are rejected and the R&R is adopted, as clarified by the instant Opinion.

I.

This Court reviews *de novo* those portions of an R&R to which specific objections are made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). *See also U.S. Fidelity and Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1088 (6th Cir. 1992) (noting that a district court conducts *de novo* review of magistrate judge's rulings on dispositive motions); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995) ("[A] general objection to a magistrate's report, which fails to specify the issues of

contention, does not satisfy the requirement that an objection be filed. The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious."). The Court may accept, reject or modify any or all of the Magistrate Judge's findings or recommendations. 28 U.S.C. § 636(b)(1).

II.

Petitioner was convicted of murder by a Genesee County jury and was sentenced to life imprisonment on October 27, 1993. The Magistrate Judge recommended that the petition be dismissed because it was barred by the statute of limitations. Petitioner has filed lengthy objections to the R&R. While he does not dispute that his petition is untimely, he contends that he should be entitled to equitable tolling because he has raised a claim of actual innocence.

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, PUB. L. NO. 104-132, 110 STAT. 1214 ("AEDPA"). Section 2244(d)(1) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining "properly filed").

The Magistrate Judge concluded that § 2244(d)(1)(A) provides the period of limitation in this case and that the other subsections do not apply to the grounds that Petitioner has raised. Under § 2244(d)(1)(A), the one-year limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time

for seeking such review." Petitioner appealed his conviction to the Michigan Court of Appeals and Michigan Supreme Court. The Michigan Supreme Court denied his application on February 3, 1997. Petitioner did not petition for certiorari to the United States Supreme Court. The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the United States Supreme Court had expired. The ninety-day period expired on Monday, May 5, 1997. The statute of limitations began running that date and expired on May 5, 1998. The petition was not filed until 2008, ten years after the statute of limitations expired. The Magistrate Judge concluded, therefore, that, absent equitable tolling, the petition was time-barred. The Magistrate Judge also concluded that equitable tolling was unwarranted on the facts of the case.

Petitioner objects to the R&R, contending that he is entitled to equitable tolling because he has raised a credible claim of actual innocence. He also vaguely suggests that the statute of limitations should be calculated under 28 U.S.C. 2244(d)(1)(D), from the date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

To the extent Petitioner suggests that the statute of limitations should be calculated under § 2244(d)(1)(D), he puts forward the affidavits of Ronda Hudson, Demond Louis and Linda Fleming, all of whom make averments related to the likelihood that the government's key eyewitness was the actual murderer. (*See* Hudson Aff., docket #8 at 10; Louis Aff.,

docket #6 at 16; Fleming Aff., docket #6-2 at 12.) Those affidavits are unhelpful to Petitioner. First, the affidavit of Ronda Hudson was signed on January 30, 1997, before his conviction became final. Demond Louis' affidavit was signed on March 16, 1999. Linda Fleming's affidavit was signed on July 16, 2002. Even assuming that the affidavits contain newly discovered evidence, a dubious conclusion in light of Petitioner's admitted knowledge about the underlying facts involving these possible witnesses at the time of trial, his petition remains untimely under § 2244(d)(1)(D). Assuming that the statute of limitations began to run as of the date of the latest of these affidavits, July 16, 2002, absent tolling, Petitioner had until July 16, 2003 in which to file his habeas petition. He did not file until June 2008. Moreover, according to the allegations of the amended complaint, Petitioner did not file any post-conviction motion after that date that could have tolled the statute of limitations. As a result, absent equitable tolling, Petitioner's claim is time-barred.

A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004); *Jurado v. Burt*, 337 F.3d 638, 642 (6th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002). The Sixth Circuit has repeatedly cautioned that equitable tolling should be applied "sparingly" by this Court. *See Jurado*, 337 F.3d at 642; *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002); *Dunlap*, 250 F.3d at 1008-1009. In *Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005), the Supreme Court held that a petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way." *Id.* at 418 (applying standard set forth in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

Petitioner generally claims that he is actually innocent of the offenses for which he was convicted. The Sixth Circuit has held that a habeas petitioner who demonstrates a credible claim of actual innocence based on new evidence may, in exceptional circumstances, be entitled to equitable tolling of habeas limitations. *See McCray v. Vasbinder*, 499 F.3d 568, 571 (6th Cir. 2007); *Souter v. Jones*, 395 F.3d 577, 597-98 (6th Cir. 2005). Petitioner, however, fails to present such exceptional circumstances.

To support a claim of actual innocence, a petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. *Souter*, 395 F.3d at 590, 598-99; *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Allen*, 366 F.3d at 405. A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Furthermore, actual innocence means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. A petitioner "must produce evidence of innocence so strong that the court can not have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Allen*, 366 F.3d at 405 (internal quotations and citations omitted).

Petitioner has made no such showing in this case. His alleged newly discovered evidence was substantially available to him at trial. While the precise contours of the affidavits may have been new as of 1997, 1999 and 2002, one theory of the defense at trial was that Petitioner was being framed by the prosecution's lead witness, who himself was responsible for the murder.

Moreover, nothing about the Sixth Circuit's recognition of actual innocence as a basis for equitable tolling suggests that such evidence will indefinitely toll the statute of limitations. Instead, The Supreme Court has clearly indicated that equitable tolling, regardless of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights. *See Pace*, 544 U.S. at 418. Petitioner has failed utterly to demonstrate the necessary diligence in exercising his rights. By July 2002, Petitioner had acquired all of the evidence that he recites to support his actual innocence, yet he waited until June 2008 to bring his claim before any court. Such a delay falls far short of demonstrating the requisite diligence. As a result, Petitioner has failed to demonstrate that his is the "rare and extraordinary case," *Souter*, 395 F.3d at 590, in which evidence of actual innocence should toll the statute of limitations.

III.

Having considered each of Petitioner's objections and finding no error, the Court hereby denies Petitioner's objections and adopts the Report and Recommendation of the Magistrate Judge, as clarified by this Opinion.

Under 28 U.S.C. § 2253(c)(2), the Court also must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard.

Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of petitioner's claims. *Id.*

This Court denied Petitioner's application on the procedural grounds that it was barred by the statute of limitations. Under *Slack*, 529 U.S. at 484, when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the

prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.* The Court finds that reasonable jurists could not debate that this Court correctly dismissed each of Petitioner's claims on the procedural ground that the petition is barred by the statute of limitations. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* Therefore, the Court denies Petitioner a certificate of appealability.

A Judgment consistent with this Opinion shall be entered.

Dated: June 18, 2009

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FLOYD PERKINS #233916,
Petitioner,

v. Case No. 2:08-cv-139
HON. ROBERT HOLMES BELL

G. MCQUIGGIN,
Respondent.
_____/

REPORT AND RECOMMENDATION

Petitioner Floyd Perkins filed this petition for writ of habeas corpus challenging the validity of his state court convictions. Petitioner was convicted pursuant to a guilty plea of murder on August 13, 1993, and was sentenced to life in prison. Petitioner filed an appeal in the Michigan Court of Appeals, which was denied on May 14, 1996. Petitioner's subsequent appeal in the Michigan Supreme Court was denied on February 3, 1997. Petitioner took no further action until October 10, 2000, when he filed a motion for relief from judgment in the Genesee County Circuit Court, which was denied. Petitioner is unsure of the date his motion for relief from judgment was denied. Petitioner did not appeal the denial to either the Michigan Court of Appeals or the Michigan Supreme Court.

Promptly after the filing of a petition for habeas corpus, the court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the

district court." Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v Perini*, 424 F.2d 134, 141 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970) (district court has the duty to "screen out" petitions that lack merit on their face). After undertaking the review required by Rule 4, the undersigned recommends that Petitioner's application for habeas corpus relief be dismissed with prejudice.

In the opinion of the undersigned, Petitioner's application is barred by the one-year period of limitation provided in 28 U.S.C. § 2244(d)(1), which was enacted on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act , PUB. L. NO. 104-132, 110 STAT. 1214 (AEDPA). Section 2244(d)(1) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The running of the period of limitation is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

In this case, § 2244(d)(1)(A) provides the period of limitation. The other subsections do not apply to the grounds that Petitioner has raised. Under § 2244(d)(1)(A), the one-year limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." According to Petitioner's application, the Michigan Supreme Court denied his appeal on February 3, 1997. Petitioner did not petition for certiorari to the United States Supreme Court. The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the United States Supreme Court had expired. *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on May 5, 1997. Therefore, the statute of

limitations began running on that date and expired on May 5, 1998.

While 28 U.S.C. § 2244(d)(2) provides that the one-year statute of limitations is tolled while a duly filed petition for state collateral review is pending, the tolling provision does not "revive" the limitations period (i.e., restart the clock); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations. Because Petitioner's one-year period expired on May 5, 1998, his motion for relief from judgment filed on October 10, 2000, did not serve to revive the limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003); *Thomas v. Johnson*, No. 99-3628, 2000 WL 553948, at *2 (6th Cir. Apr. 28, 2000); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000); *see also Rashid v. Khulmann*, 991 F. Supp 254, 259 (S.D. N.Y. 1998); *Whitehead v. Ramirez- Palmer*, No. C 98-3433 VRW PR, 1999 WL 51793, at *1 (N.D. Cal. Feb. 2, 1999).

In summary, the undersigned concludes that Petitioner's claims are barred by the applicable statute of limitations and therefore recommends that this Court dismiss the petition with prejudice.

The Court of Appeals has suggested that a habeas petitioner is entitled to notice and an adequate opportunity to be heard before dismissal of his petition on statute of limitations grounds. *See Scott v. Collins*, 286 F.3d 923, 930 (6th Cir. 2002). This report and recommendation shall serve as notice that the District Court may dismiss Petitioner's application for habeas corpus relief as timebarred. Furthermore, Petitioner's ability to file objections to this report and

recommendation constitutes his opportunity to be heard by the District Judge.

In addition, if Petitioner should choose to appeal this action, I recommend that a certificate of appealability be denied as to each issue raised by Petitioner in this application for habeas corpus relief. Under 28 U.S.C. § 2253(c)(2), the court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A dismissal of Petitioner's action under Rule 4 of the Rules Governing § 2254 Cases is a determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that an issue merits review, if the court has already determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it is "somewhat anomalous" for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Commissioner of Correction of the State of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was "intrinsically contradictory" to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate

of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. Aug. 27, 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. Aug. 27, 2001). Consequently, the undersigned has examined each of Petitioner's claims under the *Slack* standard.

The undersigned recommends that the court deny Petitioner's application on procedural grounds that it is barred by the statute of limitations. Under *Slack*, 529 U.S. at 484, when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.* The undersigned concludes that reasonable jurists could not debate that each of Petitioner's claims are properly dismissed on the procedural grounds that it is barred by the statute of limitations. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* Therefore, the undersigned recommends that the court deny Petitioner a certificate of appealability.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley

TIMOTHY P. GREELEY

UNITED STATES MAGISTRATE JUDGE

Dated: September 17, 2008

Order

Michigan Supreme Court
Lansing, Michigan

Entered: January 31, 1997

106462

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Elizabeth A. Weaver
Marilyn Kelly
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 106462
COA: 170127
LC: 93-048430-FC

FLOYD GENE PERKINS,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 31, 1997 _____ Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

UNPUBLISHED
May 14,1996

No. 170127
LC No. 93-048430-FC

FLOYD GENE PERKINS,
Defendant-Appellant.

Before: Michael J. Kelly, PJ, and Bandstra and S.B. Miller, * JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). After defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082, he was sentenced to life imprisonment without parole. We affirm.

Defendant first argues that the trial court should have sua sponte instructed the jury, pursuant to CJI2d 5.5 and 5.6, that the testimony of accomplice witness Daman Jones was to be considered "with caution." Assuming that defendant correctly contends Jones was an accomplice for purposes of this argument,[1] we nonetheless conclude that the trial court did not err requiring reversal in failing to give

the sua sponte instructions. Where an omitted instruction is related to the examination of accomplice testimony, the trial court's failure to give the instruction sua sponte will warrant reversal only where the issue of defendant's guilt is closely drawn. *People v Buck,* 197 Mich App 404, 415; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb,* 444 Mich 813; 508 NW2d 502 (1993). The phrase "closely drawn" has been interpreted to include those instances where the trial is nothing more than a mere credibility contest between the defendant and the accomplice. *Id.* However, if the guilt of the defendant is premised upon independent circumstantial evidence and testimony of others, reversal is not warranted. *Id.* at 415-416; *People v Tucker,* 181 Mich App 246, 256; 448 NW2d 811 (1989).

The instant case did not involve a mere credibility contest between defendant and Damarr Jones; the finding that defendant was guilty was supported by the testimony of many others besides Jones. For example, witness Mays testified that, in the past, defendant had told him that, if he was going to kill someone, he would stab the person in the head, similar to the way the murder victim was stabbed in this case. Witness Player testified that, prior to the killing, defendant had told him that "Rodney gots to go" because he was a "snitch," referring to the murder victim. Witness Vaughn testified that defendant also had told him, on more than one occasion and including the day of the murder that he would kill Henderson and also testified that, on the evening of the killing, defendant returned to the house without Henderson and said "[i]t's done." Vaughn also testified that

defendant described to him, over the phone, the way in which the victim had been slain.[2]

Defendant next argues that the trial court failed to properly instruct the jury by not providing pretrial preliminary instructions regarding the presumption of innocence or the prosecutor's burden of proof and by failing to warn the jury that the information against defendant was not any evidence of guilt, but instead telling the jury that "[t]he fact that a defendant is arrested and is on trial is no evidence against him." Because these issues were not the basis of any objection at trial, we review to determine whether relief is necessary to avoid manifest injustice to defendant. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We find no manifest injustice in this case. The trial court is not required to use the standard criminal jury instructions because they are not officially sanctioned by our Supreme Court. *Buck, supra* at 425-426, and the jury was adequately instructed on the basic principles of law surrounding each of the issues raised by defendant. Further, the fact that these instructions were provided to the jury at the close of proofs rather than prior to the opening of proofs does not constitute manifest injustice. *People v Cramer,* 201 Mich App 590, 595; 507 NW2d 447 (1993).

Finally, defendant argues that the prosecutor's comments regarding defendant's intent to "torture" the victim and that defendant murdered with an "evilness" were improper. Although prosecutors must refrain from denigrating defendants with intemperate and prejudicial remarks, prosecutors are accorded great

latitude regarding their arguments and conduct and they are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case. *People v Bahoda,* 448 Mich 261, 282-283; 531 NW2d 659 (1995). Under these standards, we do not conclude that the prosecutor's statements regarding defendant's intent to "torture" the victim were improper in light of the evidence that there was a total of nineteen stab wounds as well as testimony that defendant told Vaughn and Player that he had thought about stabbing as a means of torturing someone. The prosecutor's comment regarding defendant's "evilness" was not improper, but rather, was an attempt to colorfully summarize the evidence with regard to the motive and intent that the prosecutor believed defendant possessed at the time of the crime. *People v Malone,* 193 Mich App 366, 371; 483 NW2d 470 (1992), aff'd 445 Mich 369; 518 NW2d 418 (1994); *Buck, supra* at 414-415.

Further, even if the prosecutor's comments could be considered improper, there was no objection raised at trial. A curative instruction, resulting from an objection, could have eliminated any prejudicial effect, and we would not reverse defendant's conviction on this issue even if the prosecutor had acted improperly. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994); *Buck, supra.*

We affirm.

/s/Michael J. Kelly
/s/Richard A. Bandstra
/s/ Stephen B. Miller

1 We note that assigning accomplice status to Jones is inconsistent with defendant's theory at trial, i.e., that he was not involved with the murder at all, with or without an accomplice.

2 We also conclude that counsel's failure to request the cautionary accomplice instruction was not prejudicial to defendant because the issue of defendant's guilt was not closely drawn. *Tucker, supra.*

No. 09-1875

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLOYD PERKINS,
Petitioner-Appellant,

v.

G. McQUIGGIN,
Respondent-Appellee.

FILED
Apr 26, 2012
LEONARD GREEN, Clerk

ORDER

BEFORE: MOORE and COLE, Circuit Judge; and BECKWITH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

---

* Hon. Sandra S. Beckwith, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

FILE NO. 93-048430-FC

FLOYD G. Perkins, HON. RICHARD B. YUILLE

APPELLANT-DEFENDANT,

vs.

PEOPLE OF THE STATE OF MICHIGAN,

APPELLANT-PLAINTIFF.

_____/

STATE OF MICHIGAN)
) SS: AFFIDAVIT OF FACT
COUNTY OF MONTCALM)

I Linda Fleming do hereby declare under the penalty of perjury, under my own volition, and without persuasion or threat to my well-being, that the following statement is true to the best of my knowledge, information, and belief, and can competently testify to such if called as a witness.

On or about March 04, 1993 I was gainfully employed at the Pro-Clean Cleaners located at .the corner of Pierson and Fleming Rd. On the aforementioned date, I was approached by a customer of medium built, light skinned with short hair, and appeared to be about 5 foot 9 or 5 foot 10. I was ask if there was anything we could do to remove blood. The customer then presented a pair of pants, being orange in color, with a name brand of damage. The pants had large amounts of blood covering the front left and right sides, with majority of the stains in the thigh area. The

customer then presented a multi-colored cocktail shirt which also had large amounts of blood around the front bottom of the shirt. After inspecting the clothing, I then ask the customer, what had caused him to have so much blood all over his clothing? The customer replied, "I was in a fight."

Ms. Linda Fleming
602 E. Stewart St.
Flint, MI 48505

Subscribed to and sworn before
me 16th day of July 2002
Notary Public, County of Genesee, MI

My commission expires: 1-10-2003

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF SAGINAW)

I Demond Louis, being of sound mind, would like to state that:

l) On March 4, 1993 I was at the home of Anika Terrell, located on the 5600 block of Marja Avenue in Flint, Michigan.

2) I spent the entire day at this residence and stayed there over night. During the course of this day, later in the eveing, Damarr Jones did arrive. Shortly after Rodney Henderson, Chauncy Vaughn, and Floyd Perkins arrived. After about an hour of being there Jones, Henderson, and Perkins left the residence together.

3) At approximately 11:00pm Damarr Jones did return to this same residence, alone. He/Jones asked to speak to me, at which time we went into the basement. Once in the basement alone with me, Jones bragged, confessing to me that he had just killed someone.

4) I then asked Jones to tell me exactly what he meant by that statement. Once again Jones stated that he had just killed someone. I asked him/Jones who had he killed, and he/Jones replied Rodney. I believed that meant Rodney Henderson, with whom Jones had left with earlier.

5) Concerned and worried I just looked at Jones for a moment. As I looked at him/Jones I noticed that he had blood on his shoes and on the front part of his pants legs. (The clothing he/Jones had on consisted of orange colored shoes and orange pants, with a matching colorful shirt.) The moment I asked Jones what had happened he began to confess that he had stabbed

Rodney (Henderson) in the back, and that he stabbed him repeatedly.

6) After confessing this to me, Damarr Jones told me to keep this information to myself, and that no one other than he and I knew of the incidence, also that I was the first person that he had told. At that point I told

(1) (continued on next page)

continued...

him/Jones that I would talk to him in the morning. I then went upstairs and left him in the basement alone. I had no idea if something had actully happened to Mr. Henderson or not. Yet I was quite aware that something had occurred, because of all the blood that was on Jones.

7) On March 5,1993 Damarr Jones entered the bedroom on the ground floor of the same residence and awoke me. I'm not sure of the time, but it was in fact early, because everyone else was still sleeping. Jones asked me to go with him. I asked where, and he/Jones told me that he had something he needed to do. Jones had changed clothing. I then dressed and went down into the basement where he/Jones was at. I then observed Jones placing his pair of orange pants into a brown paper bag along with his orange tennis shoes. These items were still blood stained.

8) I then exited the residence along with Jones. We then proceeded to walk two blocks over to a business. I beleve the name of the establishment is Pro-Clean Dry Cleaners, which is located on Pierson Rd/Fleming Rd, in the city of Flint, Michigan.

9) Once in the parking lot I observed Jones placing the orange shoes into the near by dumpster (These were the same shoes he had on with the blood stains and that I saw him stuff into the paper bag.) I asked Jones

why he was throwing the shoes away? He/Jones replied, "could'nt get the stains out last night", I beleve that to mean he tried to clean the blood off himself.
10) Jones then told me to wait outside while he went into the cleaners. He returned shortly. Jones entered the cleaners with his orange pants and came out without them (these are the forementioned blood stained pants of Damarr Jones.)
11) On March 6, 1993. I found out that the body of Rodney Henderson had been found. That he/Rodney Henderson had in fact been murdered. I did
(2) (cont P3)
not come forth with the information I knew, contained herein, because I was young, scared, and did not know what to do. I feared that if I spoke to anyone about what Jones told me as well as the things I observed, that Jones would do to me, what he said he did to Rodney. Yet now as a young man I know that it was morally wrong for me to withhold this information. I know the information I've held for so long should be and needs to be told as truthfully and as accurately as I can recall it, because it is the right thing to do. I've since turned my life over to My Lord Jesus Christ and the burden of this is weighing heavy on my soul.

* * * * * * * * * * * * * * *

The above statements I've made are true and factual to the best of my knowledge and recollection. I make this statements of my own free will, with no duress or coercion whatsoever. I've not been threatened, nor harmed nor enticed to make this statement, nor have I been promised anything in return for my confession of these facts.

I stand by these statements, and willing to testify to these statements under oath in any court of law within the United States of America.

Demond Louis 3-16-99

Subscribed and sworn to me, this 16 day of March, 1999, ...in and for ... County. State of Michigan. Notary Public. My commission expires Sept 30, 2001. Acting in Saginaw County.

STATE OF MICHIGAN
IN THE COURT FOR THE COUNTY OF GENESEE

STATE OF MICHIGAN)
) ss: Affidavit of Ronda Hudson
COUNTY OF GENESEE)

I, Ronda Hudson, being of sound mind would like to state that:

1. On the second weekend of the second week of March 1993 I did receive information from Louis Ford.

2. And that he did inform me that he had been at a residence in which Damarr (Jones) bragged that he had stabbed Rodney (Henderson) and had taken his clothes to the cleaners and then he laughed about it.

3. That after receiving this information I did in fact ask Louis if he had told this to the police, and would he testify to what he had been told. And that he stated that he would not talk to the police nor testify, but felt I should have the information.

4. After receiving this information I did pass it along to Floyd Perkins.

5. I did check the cleaners surrounding my neighborhood and in the third cleaners I found a clerk that did in fact see Damarr Jones come into the cleaners and that he (Damarr Jones) had clothing covered in blood.

6. The above statements are true and factual to the best of my knowledge. I make these statements of my own free will and under no duress or coercion whatsoever. Nor have I been promised anything in return for my confession of truth.

Signature

Subscribed and Sworn to before me this 30th day of January 1997. Notary Public, County of Genesee Michigan.

My commission expires: 8/22/98
Cristi L. Taylor

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 12-126

IN THE

Supreme Court of the United States

GREG MCQUIGGIN, WARDEN,

Petitioner.

v.

FLOYD PERKINS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT FLOYD PERKINS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a one-year statute of limitations for filing a petition for a writ of habeas corpus. The following questions are before the Court:

1. Is a credible claim of actual innocence a valid basis for equitably tolling the AEDPA statute of limitations?

2. If so, must a petitioner who has a credible claim of actual innocence also demonstrate he has diligently pursued his rights?

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STATEMENT OF THE CASE

Greg McQuiggin, a Warden with the Michigan Department of Corrections, seeks review of the Sixth Circuit's decision entered in *Perkins v. McQuiggin,* 670 F.3d 665 (6th Cir. 2012). The panel unanimously found that a credible claim of actual innocence, without more, warrants equitable tolling of AEDPA's statute of limitations. *Id.* Rehearing and rehearing *en banc* were denied without dissent. (Pet. App. 47a.)

None of the Warden's bases for review justify a writ of certiorari. First, he asserts that several circuit court decisions conflict with the Sixth Circuit's holding. (Pet. App. 8–10, 13–16.) No case following *Holland v. Florida,* 130 S. Ct. 2549 (2010), however, conflicts with the Sixth Circuit's decision. Rather, those circuits that have considered the issues involved in this case post-*Holland* (the Second, Ninth, Tenth, and Eleventh Circuits) all agree with the Sixth Circuit. Second, the Warden claims that the Sixth Circuit's holding conflicts with *Holland* itself. (Pet. App. 10–12, 16–19.) But *Holland* held that AEDPA's statute of limitations may be equitably tolled. 130 S. Ct. at 2560, 2562. Thus, not surprisingly, the Sixth Circuit cited *Holland* as supporting its conclusion regarding equitable tolling. Finally, the Warden (joined in part by *Amici Curiae*) asserts that the Sixth Circuit's decision welcomes relief based on frivolous claims of actual innocence and opens the door to burdensome new trials. (Pet. App. 11, 19–21.) Given the high burden associated with clearing both the credible claim of actual innocence and habeas corpus hurdles, however, the Warden's concerns are unfounded. For all of those reasons, the Warden's Petition for a Writ of

Certiorari to the Sixth Circuit Court of Appeals should be denied.

I. STATE COURT PROCEEDINGS

On March 4, 1993, Floyd Perkins attended a house party in Flint, Michigan, with his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three men left the party together. Henderson was later discovered on a wooded trail, deceased as a result of stab wounds to the head. (Pet. App. 2a–3a.)

Perkins was arrested and charged with open murder in Michigan state court. He pled not guilty. Conflicting testimony was presented at trial. Jones testified that Perkins stabbed Henderson on the trail and then fled the scene. Perkins testified that after the three men left the party, they went to a convenience store. Perkins stated that Jones and Henderson left the store before Perkins had finished paying. Perkins testified that he never entered the trail where Henderson's body was found. Perkins later saw Jones under a streetlight, agitated and wearing distinctive bloody clothes. (Pet. App. 3a.)

The jury convicted Perkins of first degree murder. He was sentenced to life in prison without the possibility of parole. (Pet. App. 26a, 42a.) Perkins exhausted his state court appeals and his conviction became final on May 5, 1997. (Pet. App. 3a.)

II. DISTRICT COURT PROCEEDINGS

On June 13, 2008, Perkins filed a petition for a writ of habeas corpus with the United States District Court for the Western District of Michigan. His claims of error related to sufficiency of the evidence, jury instructions, trial procedure, prosecutorial misconduct, and ineffective assistance of counsel.

(Pet. App. 3a.) Perkins requested equitable tolling of the one-year AEDPA statute of limitations on the ground that he is actually innocent. (Pet. App. 28a.)

Perkins presented three supporting affidavits. First, Ronda Hudson stated that she heard Jones bragging about killing Henderson and then taking his bloody clothes to the dry cleaner. (Pet. App. 54a–55a (Jan, 30, 1997).) Second, Demond Louis stated that Jones admitted to killing Henderson on the night of the murder. Jones was wearing blood-stained orange shoes, orange pants, and a colorful shirt at the time. The next day, Louis accompanied Jones to a dry cleaning store, where Jones dropped off his bloody pants and shirt. Jones threw his shoes in a dumpster outside the dry cleaner. (Pet. App. 50a–53a (March 16, 1999).) And third, Linda Fleming, a clerk at the dry cleaning store, stated that a man matching Jones' description came into the store around the date of the murder, asking Fleming to remove blood stains from orange pants and a colorful shirt. (Pet. App. 48a–49a (July 16, 2002).)

The magistrate judge's Report and Recommendation found that Perkins' petition was barred by the one-year AEDPA statute of limitations. (Pet. App. 35a.) The district court agreed, but further found that Perkins was not entitled to equitable tolling based on a credible claim of actual innocence because he had failed to diligently pursue his rights. (Pet. App. 31a.) According to the district court, "[b]y July 2002, Petitioner had acquired all of the evidence that he recites to support his actual innocence, yet he waited until June 2008 to bring his claim before any court. Such a delay falls far short of demonstrating the requisite diligence" (*Id.*) The district court

denied Perkins' petition for a writ of habeas corpus and his request for a certificate of appealability. (Pet. App. 31a, 33a.)

III. PERKINS' APPEAL AND SUBSEQUENT PROCEEDINGS

Perkins sought a certificate of appealability from the Sixth Circuit. The Sixth Circuit issued the certificate and identified one issue for review: whether "'reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling.'" (Pet. App. 5a (citing Order Granting Certificate of Appealability).) The Sixth Circuit then unanimously reversed and remanded to the district court so it could "consider whether Perkins asserts a credible claim of actual innocence." (Pet. App. 21a.)

The Sixth Circuit first found that actual innocence is a valid basis for equitably tolling AEDPA's statute of limitations. Following its earlier holding in *Souter v. Jones*, the Sixth Circuit held that "'where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the [AEDPA statute of limitations] gateway and argue the merits of his underlying constitutional claims.'" (Pet. App. 8a (quoting 395 F.3d 577, 602 (6th Cir. 2005)).)

The Sixth Circuit then found that habeas petitioners in the unique position of having a credible claim of actual innocence need not demonstrate reasonable diligence. "Given the Supreme Court's rich jurisprudence protecting the rights of the wrongfully incarcerated, petitioners who seek equitable tolling based on actual innocence should

not be treated the same way as those seeking equitable tolling because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons." (Pet. App. 21a.) In other words, unlike in other equitable tolling contexts, reasonable diligence is not a precondition to passing through the AEDPA statute of limitations gateway in the unique case where a petitioner has a credible claim of actual innocence. (*Id.*)

The Warden responded by seeking rehearing *en banc*. The Sixth Circuit denied rehearing and *en banc* review without dissent. (Pet. App. 47a.)

REASONS FOR DENYING THE PETITION

I. POST-*HOLLAND* CIRCUIT COURT DECISIONS DO NOT CONFLICT.

According to the Warden, this Court should grant a writ of certiorari to resolve "mature circuit conflicts" regarding both innocence-based equitable tolling and reasonable diligence. (Pet. App. 4.) Several of the circuits the Warden references do not, in fact, disagree with the Sixth Circuit. Following this Court's decision in *Holland,* moreover, the circuit courts are in agreement regarding equitable tolling in cases where a credible claim of actual innocence has been made. Likewise, the clear post-*Holland* trend is to forego reasonable diligence. The Warden's claimed conflicts ring false. As a result, the Court need not review this case. *See* SUP. CT. R. 10(a).

A. Following *Holland*, The Circuit Courts Agree That A Credible Claim Of Actual Innocence Justifies Equitable Tolling Of The AEDPA Statute Of Limitations.

Citing cases from 2002–2005, the Warden claims that the First, Fifth, and Seventh Circuits disagree with the Sixth Circuit regarding innocence-based equitable tolling. (Pet. App. 9 (citing *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002); *Escamilla v. Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005)).) But other decisions from those same circuits belie the Warden's assertion. The First Circuit has recently acknowledged that innocence-based equitable tolling may be appropriate. *Riva v. Ficco*, 615 F.3d 35, 44 n.4 (1st Cir. 2010) (vacating and instructing the district court to consider on remand whether the petitioner has a credible claim of actual innocence that justifies tolling the AEDPA statute of limitations). The Fifth Circuit has indicated that "[t]here is no precedent in this circuit whether actual innocence may equitably toll the [AEDPA] statute of limitations." *Prince v. Thaler*, 354 F. App'x 846, 847 (5th Cir. 2009) (declining to decide the issue of innocence-based equitable tolling because the petitioner's claim of actual innocence was not credible). And the Seventh Circuit has indicated that actual innocence may be relevant to a claim for equitable tolling in the appropriate case. *See Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004) (adopting the Eighth Circuit's approach articulated in *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002) ("We do not hold that actual innocence can never be relevant to a claim that the habeas statute of limitations

should be equitably tolled."), *cert. denied*, 537 U.S. 1236 (2003)).

Moreover, *all* of the cases the Warden cites were decided *well before* the Court issued its *Holland* decision in 2010. Following *Holland*, every circuit to address the issue has found that innocence-based equitable tolling is appropriate. *See Rivas v. Fischer*, 687 F.3d 514, 548 (2nd Cir. 2012) (finding it highly relevant that "no court has settled on the contrary conclusion [regarding innocence-based equitable tolling] following the Supreme Court's decision" in *Holland*). Indeed, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits—five circuits—have indicated post-*Holland* that the AEDPA statute of limitations may be equitably tolled based on a credible claim of actual innocence. *Rivas*, 687 F.3d at 548; *Perkins*, 670 F.3d at 672; *Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (*en banc*); *Sandoval v. Jones*, 447 F. App'x 1, 4–5 (10th Cir. 2011); *San Martin v. McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011), *cert denied*, *San Martin v. Tucker*, 132 S. Ct. 158 (2011).[1]

The Warden claims that looking only to cases following *Holland* is a "red herring." (Pet. App. 19.) In reality, it is a proper respect of precedent. After all, *Holland* was a landmark decision; this Court announced new legal principles. *Holland* made clear that "traditional principles of equity continue to have a place in the review of habeas petitions following the enactment of AEDPA." *Rivas*, 687 F.3d at 549.

---

[1] Following *Holland*, the Fifth Circuit held that claims of innocence may not toll AEDPA's statute of limitations. *Henderson v. Thaler*, 626 F.3d 773 (5th Cir. 2010). *Henderson*, however, did not address factual innocence, but innocence from a sentence of death, so it is inapposite.

Holland emphasized generally that courts must "not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (quoting *Miller v. French*, 530 U.S. 327, 340 (2000) (internal quotation marks omitted)). No such clear command can be derived from AEDPA's text. *See* § II(A), *infra*. As a result, federal courts may hear claims that are barred (whether by procedural default or the statute of limitations) if they are accompanied by a credible claim of actual innocence.

In short, the Warden's alleged circuit split with respect to innocence-based equitable tolling is illusory. Several cases undercut the Warden's claim that the First, Fifth, and Seventh Circuits disagree with the Sixth Circuit's decision. Moreover, a "growing chorus" of circuit courts across the country have fallen in line with *Holland's* new rules by permitting innocence-based equitable tolling. *See Rivas*, 687 F.3d at 552. That "growing chorus"—not cases that came before the landmark *Holland* decision—should be considered. *Id.* Based on those cases, there is no circuit court split that calls for this Court's review. At the very least, the Court should wait for an actual post-*Holland* conflict, if one ever comes to pass, before it finds the need to further weigh in on the issue of equitable tolling.

B. Following *Holland*, The Circuit Courts Also Agree That Reasonable Diligence Is Not Required For Equitable Tolling Based On A Credible Claim Of Actual Innocence.

Citing cases from the Third, Seventh, and Eighth Circuits, the Warden also argues that the circuit courts are divided as to whether petitioners seeking

equitable tolling based on a credible claim of actual innocence are required to demonstrate reasonable diligence in pursuing their rights. (Pet. App. 15 (citing *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618–19 (3rd Cir. 1998); *Gildon*, 384 F.3d at 887; *Flanders*, 299 F.3d at 978).) But here again, the Warden does not tell the full story. For one thing, *Miller* is inapposite; it addresses equitable tolling based on lack of access to legal documents and inadequate knowledge of the time limitations. *See* 145 F.3d at 617. For another, the two remaining circuits issued their opinions prior to the Court's watershed decision in *Holland*.

After *Holland*, no circuit court has held that reasonable diligence is a precondition to equitable tolling based on a credible claim of actual innocence.[2] In fact, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits have all indicated in the years following *Holland* that reasonable diligence is not required in actual innocence cases. *Rivas*, 687 F.3d at 547–552; *Perkins*, 670 F.3d at 675; *San Martin*, 633 F.3d at 1267–68; *Lee*, 653 F.3d at 934; *Lopez v. Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 307 (2011).

To be sure, *Holland* did not squarely address whether reasonable diligence must be demonstrated

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[2] The Third Circuit assumed in a case where equitable tolling was sought based on ineffective assistance of counsel that a petitioner seeking to toll AEDPA's statute of limitations based on a credible claim of actual innocence "would still have the burden of demonstrating...reasonable diligence[.]" *Reed v. Harlow*, 448 F. App'x 236, 238 n.2 (3rd Cir. 2011). The Third Circuit cited *Miller*, 145 F.3d at 618–19, as support. As indicated above, however, *Miller* also does not address equitable tolling based on a credible claim of actual innocence.

before a habeas petitioner may seek innocence-based equitable tolling. *See* § II(B), *infra*. But, following *Holland*, the circuit court trend is to forego reasonable diligence. That trend reflects the sound reasoning, articulated throughout the Court's decisions, that actual innocence is different from other grounds for equitable relief. Equity must be liberally provided in actual innocence cases to avoid a "miscarriage of justice." *See Schlup v. Delo*, 513 U.S. 298, 299 (1995).

Taking into account this Court's precedent, post-*Holland* circuit courts have found AEDPA's statute of limitations may be equitably tolled in two different circumstances: (1) where a petitioner has demonstrated reasonable diligence and that extraordinary circumstances prevented timely filing or (2) where a petitioner has presented a credible claim of actual innocence (without more) such that providing a meaningful avenue for habeas relief is necessary to avoid manifest injustice. *See, e.g., San Martin*, 633 F.3d at 1267–68 (Reasonable diligence and extraordinary circumstances may toll the AEDPA statute of limitations, but "[a] court may also consider an untimely [habeas] petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned."); *Lopez*, 628 F.3d at 1231 ("Where. . . a petitioner argues that he is entitled to equitable tolling because he is actually innocent, this argument is premised on the same fundamental miscarriage [of justice] exception that was discussed by the Supreme Court in *Schlup* and *Coleman* [*v. Thompson*, 501 U.S. 772 (1991)], and

as such the petitioner need make no showing of cause[.]").

In short, the clear post-*Holland* trend is to only require reasonable diligence in cases where equitable tolling of the AEDPA statute of limitations is based on extraordinary circumstances, not where it is based on actual innocence and the "miscarriage of justice" ground for relief is in play. *See Schlup*, 513 U.S. at 299. Due to that trend, there is no "mature circuit conflict," as the Warden claims. (Pet. App. 4.) If a circuit court decides post-*Holland* that reasonable diligence is required in an actual innocence equitable tolling case, then perhaps the Court's review might be necessary at that time. But today, there is no conflict for the Court to resolve.

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOLLAND*.

The Warden also claims that this Court's review is necessary because the Sixth Circuit's decision conflicts with *Holland*. But the Sixth Circuit's decision is entirely consistent with *Holland*. Indeed, *Holland* supports equitable tolling of AEDPA's statute of limitations. Moreover, although *Holland* discusses reasonable diligence, it does not hold that it is required in all equitable tolling cases. Accordingly, there is no conflict with a decision from this Court. *See* SUP. CT. R. 10(c).

A. The Sixth Circuit's Decision Is Consistent With The Court's Holding In *Holland* That Equitable Tolling Is Proper Absent The "Clearest Command."

Despite the Court's clear language in *Holland* that equitable tolling of AEDPA's statute of limitations is appropriate, the Warden asserts that equitable

tolling is impermissible in the specific context of actual innocence. (Pet. App. 10–12.) He claims that AEDPA's plain text contains the "clearest command" against such tolling. (*See id.*) *See also Holland,* 130 S. Ct. at 2560 (quoting *Miller,* 530 U.S. at 340).) Under the Court's precedent, only a clear command from Congress is sufficient to overcome a presumption of equitable tolling. *Id.*

As support, the Warden cites two AEDPA provisions: 28 U.S.C. §§ 2244(b)(2)(B) and 2244(d)(1)(D). According to the Warden, there is no need for equitable tolling based on a credible claim of actual innocence because "Congress comprehensively dealt with the issue in § 2244." (Pet. App. 12.) But he is incorrect; neither § 2244(d)(1)(D) nor § 2244(b)(2)(B) provides the clearest command against equitable tolling.

Section 2244(d)(1)(D) addresses *triggering* the AEDPA statute of limitations, not *tolling.* Specifically, it provides that a habeas petitioner's one year statute of limitations is triggered when a new factual predicate for a habeas claim is discovered. 28 U.S.C. § 2244(d)(1)(D). As recognized in *Holland,* AEDPA "does contain multiple provisions relating to the events that *trigger* its running." 130 S. Ct. at 2561. But the triggering of a petitioner's claim is distinguished from tolling the statute of limitations. *See id.* (citing *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450 (7th Cir. 1990)). "Triggering" refers to the date on which a statute of limitations begins to run, while tolling stops the statute of limitations from running out. *See Cada,* 920 F.2d at 450. And § 2244(d)(1) addresses *triggering* of a habeas corpus claim, not *tolling. Holland,* 130 S. Ct. at 2561.

Congress' decision to permit AEDPA's statute of limitations to be triggered when a new factual predicate for a habeas petition is discovered does not foreclose equitable tolling based on actual innocence. *See id.*

Equitable tolling, moreover, does not render § 2244(d)(1)(D) a "nullity," as the Warden claims. (Pet. App. 11.) A claim filed within one year of the discovery of new evidence proceeds directly to the district court for a determination on the merits. *See Souter,* 395 F.3d at 600. Where equitable tolling is sought, however, a petitioner must demonstrate a credible claim of actual innocence before a court will reach the merits of his constitutional claims. "Because one must meet a significantly greater burden to pass through the gateway, no petitioner would forego filing within the one-year period under § 2244(d)(1)(D) if possible." *Id.* "The actual innocence exception [is] limited to the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence and the one-year limitations window has closed." *Id.* In short, equitable tolling does not nullify § 2244(d)(1)(D)—it simply provides an avenue for relief in cases where AEDPA's one-year statute of limitations has been triggered and run out.

Section 2244(b)(2)(B), for its part, permits a habeas petitioner to file more than one petition if he can establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. Congress did not address the statute of limitations or equitable tolling in § 2244(b)(2)(B), but it did authorize relief for habeas petitioners who have a credible claim of actual

innocence. That authorization bolsters—rather than defeats—innocence-based equitable tolling.

The Warden disagrees, claiming that Congress' reference to actual innocence in § 2244(b)(2)(B) creates a "negative inference" against equitable tolling. (Pet. App. 12.) But the mere fact that "Congress included an actual innocence exception to the procedural bars on successive habeas petitions . . . does not give rise to the negative implication that the absence of an exception was intended." *Souter*, 395 F.3d at 598. By analogy, even though Congress included a 30-day tolling period in an AEDPA limitations provision governing capital prisoners represented by competent counsel in state post-conviction proceedings, *see* 28 U.S.C. § 2263(b)(3)(B), there is no "negative implication" that tolling of § 2244(d)(1) (for any reason) is not permissible simply because it is not discussed in § 2244(d)(1). *See Souter*, 395 F.3d at 598.

In sum, contrary to the Warden's statutory arguments, the Sixth Circuit's decision permitting equitable tolling based on a credible claim of actual innocence is not at odds with *Holland*. AEDPA does not provide the clearest command against equitable tolling, in particular where a credible claim of actual innocence is the basis for such tolling. Indeed, §§ 2244(b)(2)(B) and 2244(d)(1)(D) do not address (let alone foreclose) innocence-based equitable tolling. In short, the Warden's asserted conflict with *Holland* is illusory.

B. The Sixth Circuit's Decision Regarding Reasonable Diligence Does Not Conflict With *Holland* And Is Consistent With The Court's Actual Innocence Cases.

Turning to reasonable diligence, the Warden contends that the Sixth Circuit's holding conflicts with *Holland's* statement that a habeas corpus petitioner seeking equitable tolling of the AEDPA statute of limitations must ordinarily show "that he has been pursuing his rights diligently." 130 S. Ct. at 2562 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). But the Court did not address whether reasonable diligence is required in the context of equitable tolling based on a credible claim of actual innocence. In other words, the Sixth Circuit's decision does not conflict with *Holland*.

What is more, the Sixth Circuit's decision to not require reasonable diligence comports with this Court's well-established actual innocence jurisprudence. In a variety of post-conviction contexts, the Court has made clear that a habeas petitioner, even if he was not reasonably diligent, may seek review of procedurally defaulted claims if he can make a credible claim of actual innocence. *See House v. Bell*, 547 U.S. 518, 536–37 (2006) (habeas petitioners who have procedurally defaulted their claims may have them heard by showing, without more, a credible claim of actual innocence); *Schlup*, 513 U.S. at 327 (finding, without mentioning reasonable diligence, that a credible showing of actual innocence is sufficient for a court to reach the merits of an otherwise procedurally barred habeas petition); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably

resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

The Warden attempts to summarily dismiss this Court's actual innocence cases by asserting that "the petitioners in the *House* line of cases diligently pursued their actual-innocence claims." (Pet. App. 17.) But the Supreme Court did not *require* reasonable diligence—or anything beyond a credible claim of actual innocence. Contrary to the Warden's assertions, this Court's precedent (including *House*) supports the Sixth Circuit's decision that reasonable diligence is not required for equitable tolling based on a credible claim of actual innocence.

III. THE SIXTH CIRCUIT'S DECISION INCORPORATES NECESSARY SAFEGUARDS.

A. The Sixth Circuit's Decision Will Not Open The Door To Untimely Habeas Petitions Following Frivolous Innocence Claims.

Unable to show a division in the lower courts or establish a conflict with *Holland*, the Warden resorts to arguing that the Sixth Circuit's decision should nevertheless be reviewed because it goes too far. He explains that "[w]hen the judiciary allows untimely habeas petitions based on nothing more than the petitioner's flimsy claims of innocence, the judicial branch abrogates, through equity, the one-year AEDPA limitations period that Congress constructed." (Pet. App. 20.) *Amici Curiae* agree and provide examples of a few cases where petitioners raised frivolous actual innocence claims. (*Amici* Br.

6–14.) The concerns voiced by the Warden and *Amici Curiae* are unfounded and do not support review.

The Warden and *Amici Curiae* ignore the high burden habeas petitioners face when seeking innocence-based equitable tolling. A thin, unsupported claim of actual innocence is not sufficient to equitably toll the AEDPA statute of limitations. Instead, the petitioner must present a "credible claim" of actual innocence that is supported by "new reliable evidence." *Schlup,* 513 U.S. at 324. Because it is difficult to establish a "credible claim" of actual innocence, cases where habeas petitioners are able to have their habeas claims heard on the merits based on actual innocence "remain rare." *Id.* It follows that the Sixth Circuit's decision is not the crack that will open the floodgates to untimely habeas claims in cases where petitioners provide nothing more than "flimsy" claims of actual innocence. (*See* Pet. App. 20.) Rather, high walls remain that, in most instances, will foreclose relief.

On the merits, Perkins' claim of actual innocence is not cut from the same cloth as the three cases raised by *Amici Curiae.* Perkins relies on three new affidavits, not presented at trial, that inculpate Jones and exculpate Perkins. Perkins is not making a "flimsy" claim of actual innocence. (*See id.*) The Sixth Circuit properly remanded to the district court so it could fully consider (for the first time) whether Perkins' new evidence is sufficient for innocence-based equitable tolling.

B. The Sixth Circuit's Decision Will Not Unduly Burden The Federal Courts With New Trials.

Amici Curiae also claim that the Court should review this case because of the "difficulties of

litigating guilt and innocence many years after a crime." (*Amici* Br. 2.) They contend that new trials are difficult because "'[w]itnesses die or move away; physical evidence is lost; memories fade.'" (*Amici* Br. 5 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting)).) But the Sixth Circuit's decision will not cause a flood of new trials many years after crimes were allegedly committed. To obtain new trials, petitioners will have to overcome two hurdles: (1) presenting a credible claim of actual innocence and (2) making valid habeas claims. Few petitioners will be able to do so.

IV. JURISPRUDENCE REGARDING PROTECTING THE INNOCENT CLEARLY SUPPORTS THE SIXTH CIRCUIT'S DECISION.

Finally, the Sixth Circuit's decision takes into account this Court's "rich jurisprudence protecting those that may be wrongfully incarcerated." *See Perkins,* 670 F.3d at 674. "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup,* 513 U.S. at 325. After all, "'it is far worse to convict an innocent man than to let a guilty man go free.'" *Id.* (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). Given that concern, habeas courts have long held the "equitable discretion" to "see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins,* 506 U.S. 390, 404 (1993). Indeed, equity can overcome procedural rules intended to limit habeas relief in "extraordinary case[s], where a constitutional violation has probably resulted in the

conviction of one who is actually innocent[.]" *Murray*, 477 U.S. at 496.

It would defy explanation for equitable tolling to be permitted based on the attorney error that was at issue in *Holland,* but not a credible claim of actual innocence. *See Lee*, 653 F.3d at 935 n.10. There is no stronger reason for keeping open the courthouse doors than actual innocence, "the ultimate equity on the prisoner's side." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part) (the Supreme Court "continuously has recognized that . . . a sufficient showing of actual innocence" is normally enough, "standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim"). Indeed, "the individual['s] interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup,* 513 U.S. at 324. The Sixth Circuit's decision recognized the importance of that "most compelling" ground for equitable relief by deciding that a habeas petitioner who has a credible claim of actual innocence should be permitted to pass through the one-year AEDPA statute of limitations gateway regardless of reasonable diligence.

CONCLUSION

The Warden's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN
Petitioner
v.
FLOYD PERKINS
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ALABAMA, COLORADO, FLORIDA, GEORGIA, IDAHO, OKLAHOMA, TENNESSEE, UTAH, WASHINGTON, AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

The amici curiae prosecute crimes and incarcerate criminals, so they have powerful interests in the finality of state-court judgments and maintaining society's "high degree of confidence in its criminal trials." *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J. concurring). Those interests are undermined by the rule adopted by the Sixth, Ninth, Tenth and Eleventh Circuits. The amici States thus stand to benefit if the petition is granted and the Sixth Circuit's decision reversed.[1]

ARGUMENT

This Court should grant certiorari because the rule adopted by the Sixth Circuit and other jurisdictions imposes unwarranted costs on States and the federal system. To be clear, the amici States do not contend that no innocent person has ever been convicted of a crime. Law is a human institution, and fallibility is a universal human trait. It is thus a "truism, not a revelation" that our "system of criminal punishment" must accept the "possibility that someone will be punished mistakenly." *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring). That possibility is "sensitive and, to say the least, troubling." *Herrera*, 506 U.S. at 421 (O'Connor, J. concurring). And it fully justifies post-conviction procedures that enable persons who claim

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[1] The amici States gave timely notice of their intent to file this brief to counsel for the parties on August 1, 2012. *See* Sup.Ct. R. 37(2)(a). The amici States do not need consent of the parties to file this brief. *See* Sup.Ct. R. 37(4).

to be innocent to seek their release. For example, the statutory exception to the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d)(1)(D), rightly allows inmates to file belated federal habeas petitions based on *new evidence* that materializes years after trial.

But, even though society's interest in vindicating claims of innocence is important, there are countervailing interests that require all litigation to have an end. Congress struck the right balance between these interests, and the Sixth, Ninth, Tenth, and Eleventh Circuits have struck the wrong one. These Circuits' open-ended equitable tolling exception to the one-year statute of limitations exacerbates the practical difficulties of post-conviction litigation and ignores the deleterious effects of actual-innocence claims. Because of the difficulties of litigating guilt and innocence many years after a crime, each "actual innocence" claim creates a risk that someone who is *not* innocent will escape rightful punishment. And each claim undermines the public's confidence in the criminal justice system. Amici submit this brief to highlight these countervailing costs, and explain why they warrant this Court's review of the Sixth Circuit's judgment.

A. The exception to the one-year statute of limitations will have systemic consequences.

The Sixth Circuit's rule creates an unbounded equitable-tolling exception upon a showing of actual

innocence and opens the federal courts to more belated petitions than Congress wanted. In so doing, courts adopting this rule have undermined the States' strong interest in seeing that habeas litigation ends as expeditiously and efficiently as possible.

In 1989, a Judicial Committee chaired by Justice Lewis Powell found "serious problems with the present system of collateral review . . . broadly characterized under the heading of unnecessary delay and repetition." *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report*, printed in 135 Cong. Rec. S13471-04, S13482 (1989) (hereinafter "Powell Committee Report"). To fix these problems, the Powell Committee proposed, *id.* at S13483, and Congress enacted, the statute of limitations at issue in this case. *See* Statement of Senator Joseph Biden, 135 Cong. Rec. S13471-04, S13473 (Oct. 16, 1989) ("the Powell committee recommended that the time period . . . should be limited to 6 months . . . my bill would require the [federal] habeas corpus petition to be filed within 1 year"). The Sixth Circuit's exception to the statute of limitations for claims of "actual innocence"—particularly when it is unbounded by any requirement of diligence by the petitioner—threatens to revive the "unnecessary delay and repetition" that the States experienced before this innovation. *See* Powell Committee Report, 135 Cong. Rec. at S13482

1. The statute of limitations serves important goals. In adopting the one-year statute of limitations, Congress recognized that parties cannot effectively litigate federal habeas petitions years after a conviction, because "the passage of time may make

reliable determinations of asserted claims . . . difficult or practically impossible." *E.g.*, Statement of Senator Charles Grassley, 136 Cong. Rec. S6789-03, S6828 (May 23, 1990). This Court has similarly explained that "factual determinations are often dispositive of" constitutional claims like ineffective assistance of counsel, "coerced confession, lack of competency to stand trial, and denial of a fair trial." *Peyton v. Rowe*, 391 U.S. 54, 61-63 (1968). Factual issues are, by their nature, difficult to assess years after the facts actually arise. Accordingly, delaying "the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id* at 62.

The Sixth Circuit's innocence-tolling rule is likely to lead to delays and piecemeal litigation. Especially since the tolling rule is not constrained by a requirement that the petitioner use reasonable diligence in exercising his claims, it gives inmates the freedom to wait to file their habeas petitions until the available evidence shifts to their maximum advantage. This is a special problem in capital cases. As the Powell Committee explained, "[t]he inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out." 135 Cong. Rec. at S13482.

2. The "innocence" tolling rule also has special costs, above and beyond those normally associated with habeas review. Although it is difficult to litigate anything years after the event has occurred, it is even more difficult to litigate *guilt and innocence* years after a crime is committed. But that is

precisely what the Sixth Circuit's rule requires. For every habeas petitioner that asserts his innocence, the State will have to refute his claim with an evidentiary presentation from his trial.

The practical impediments to that kind of mini-retrial are substantial: "[w]itnesses die or move away; physical evidence is lost; memories fade." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). "Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the State's ability to reconstruct its case." *Id.* (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 147 (1970)). The prosecutors, police officers, witnesses, and victims involved in the case will have moved on. The upshot is that a State starts from a disadvantaged position in refuting an innocence claim when it is brought years after the inmate was prosecuted and convicted.

B. Unfounded claims of actual innocence consume State resources and undermine the criminal justice system.

Any rule to address claims of "actual innocence" must account for the unfortunate but undeniable fact that unscrupulous prisoners falsely claim that they are innocent all the time. The paradigm is the petitioner's "actual innocence" claim in *Herrera*. In *Herrera*, the petitioner argued that he should be able to seek habeas relief on the grounds that he was "actually innocent," even though the State did not violate any of his constitutional rights. Justices O'Connor and Kennedy were sympathetic to the

petitioner's legal argument, but dismissed his particular case as "neither difficult nor troubling" because "[p]etitioner is not innocent, in any sense of the word." 506 U.S. at 419, 421 (O'Connor, concurring). In *Herrera*, "[t]he record overwhelmingly demonstrate[d] that petitioner" was guilty despite his innocence claim. *Id.* at 421.

These unfounded actual-innocence claims impose substantial costs on the system, even when they have absolutely no merit. Especially when publicized, these claims of actual innocence undermine society's faith in the criminal justice system and the finality of long-established convictions. They also require a large amount of resources to litigate and resolve. These costs arise even in cases like *Herrera* where the habeas petitioner is 100% guilty. Here are three examples.

1. *Roger Keith Coleman.* Coleman's case gave rise to one of this Court's most significant decisions on the law of procedural default—*Coleman v. Thompson*, 501 U.S. 722 (1991), in which this Court overruled *Fay v. Noia*, 372 U.S. 391 (1963), and held that an attorney's error in failing to file an appeal could bar the petitioner from pursuing his claims in federal court. That ruling was necessary, in part, because Coleman did not argue, before this Court, that he was actually innocent. But after this Court affirmed the dismissal of his petition, he turned around and very publicly—and very fraudulently—proclaimed his innocence.

Coleman was convicted of raping and murdering his sister-in-law in Virginia in 1982. *Coleman v. Commonwealth*, 307 S.E.2d 864 (1983). Coleman had previously been convicted of attempted rape, and

blood on Coleman's clothes matched his victim's. *Id.* at 870, 877. Coleman was sentenced to death. *Id.* at 876.

Coleman's case first came to this Court's attention because it presented a difficult question about procedural default. Coleman's attorney had missed an appellate deadline in state court, and the lower courts held that this procedural failure blocked Coleman from pursuing, on federal habeas review, his federal claims of ineffective assistance of counsel. Coleman sought to circumvent that default, but made no claim that he could do so because he was actually innocent. He instead asserted that because the default resulted from his attorneys' errors he could show justifiable "cause" for his default. This Court held that Coleman's habeas petition was procedurally barred. "This is a case about federalism," the Court explained, "[i]t concerns the respect that federal courts owe the States . . . when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

Following this Court's decision, Coleman then turned to the avenue many prisoners choose when they are out of options—a fraudulent claim of actual innocence. Although he had not maintained that he could get around the procedural default through an "actual innocence" exception before this Court, he filed a successive habeas petition in the district court arguing that he was "actually innocent" and could surmount the procedural default. *See Coleman v. Thompson*, 798 F. Supp. 1209 (W.D.Va. 1992). That petition was also denied. *See id.* at 1218. *See also*

Coleman v. Thompson, 504 U.S. 188 (1992) (denying application for stay of execution).

Coleman's case then became a cause célèbre. *See Marsh*, 548 U.S. at 189 (Scalia, J., concurring) (discussing Coleman's case). Coleman appeared on several TV programs, and Time Magazine put Coleman on its cover. "Roger Keith Coleman says he didn't kill anybody, but the courts are tired of listening," *Time* magazine intoned. "That could be a tragic mistake." Jill Smolowe, *Roger Keith Coleman: Must This Man Die?*, 139 TIME 40 (May 18, 1992). After Virginia's Governor received roughly 13,000 calls and letters in favor of clemency, he arranged for a lie-detector test, which Coleman failed. *See* Bonnie V. Winston & Greg Schneider, *Coleman put to death: High-profile defendant failed lie detector test*, Roanoke News (May 21, 1992), *available at* 1992 WLNR 1019950. Coleman was executed in 1992, and his last words were: "An innocent man is going to be murdered tonight." *Id.*

Public concern over Coleman's case only grew with his execution, and his supporters unabashedly used Coleman's claim of "actual innocence" to cast doubt on the legitimacy of the justice system. In 1998, for example, a book was published to make the case for Coleman's innocence, which "challeng[ed] the assumptions of anyone who believes that the American justice system is concerned primarily with justice." *See* Lisa Higgins *Amazon.com Review of* May God Have Mercy *by John C. Tucker* at http://www.amazon.com/May-God-Have-Mercy-Punishment/dp/0385332947 (last visited August 20, 2012).

But Coleman's innocence claim was a complete sham. Ten years after his execution, his legal team and a media consortium petitioned Virginia's Governor to allow new DNA testing of semen samples taken from Coleman's victim. The Governor agreed, and the DNA test confirmed what a jury had known more than twenty years earlier—that Coleman was guilty. There was only a 1-in-19 million chance that the DNA belonged to someone else. *See* Michael D. Shear & Maria Glod, *Tests Show Dead Man's Guilt,* Washington Post (January 13, 2006) available at 2006 WLNR 26032589.

2. *Sirhan Sirhan.* Tragically, Sirhan Sirhan became a household name around 45 years ago. Many of those households' residents would be shocked to learn that his attorneys have filed a habeas petition claiming that Sirhan is "actually innocent."

Sirhan shot Senator Robert F. Kennedy in 1968, at close range in the pantry of the Ambassador Hotel in Los Angeles. *See People v. Sirhan*, 497 P.2d 1121 (Cal. 1972). There has never been any doubt about his responsibility for this national tragedy. The assassination was witnessed by journalist George Plimpton, author Pete Hamill, and professional football player Rosey Grier. They were among the men who subdued and disarmed Sirhan after he fired his gun. *See* Pete Hamill, *Two Minutes to Midnight: The Very Last Hurrah*, The Village Voice (June 13, 1968).[2] Sirhan confessed to the murder, but

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[2] Available at http://blogs.villagevoice.com/runninscared/2010/05/pete_hamills_ey.php (last visited August 20, 2012).

the trial court refused to accept his guilty plea and required the prosecution to prove its case. *Sirhan*, 497 P.2d at 1127, 1133. Sirhan testified at trial that, although he admitted killing Kennedy, he could not specifically recall the shooting or confessing to the crime. *Id.* at 1127. Nonetheless, "it was undisputed that defendant fired the shot that killed Senator Kennedy." *Id.* at 1125. The prosecution established that Sirhan had killed Kennedy because of the Senator's support for Israel, and Sirhan was sentenced to life imprisonment. *Id.* at 1125-27.

Sirhan's attorneys have recently filed a federal habeas petition that claims Sirhan is "actually innocent" of the crime. *See* Sur-Reply on the Issue of Actual Innocence, (Doc. 195), *Sirhan v. Galaza*, No. CV-00-5686-CAS, (C.D. Cal. February 22, 2012). Sirhan's theory of "actual innocence" is that Sirhan was brainwashed or hypnotized into attacking Kennedy as a distraction while another, unidentified, shooter killed Kennedy as part of a conspiracy. *Id.* at 2-30. Because the habeas petition is pending in a district court within the Ninth Circuit, Sirhan's attorneys have invoked the Ninth Circuit's "actual innocence" exception to the 1-year statute of limitations. *Id.*

Sirhan's new allegations of "actual innocence" have been widely published. They have led to new conspiracy theories about Senator Kennedy's assassination forty years after the fact. *See, e.g.*, Robert Vaugh, *I know who was behind Bobby Kennedy's murder, by his actor friend Robert*

Vaughn, Daily Mail Online (January 12, 2009)[3]("one of the greatest crimes of the 20th Century remains unresolved by the official verdict, even to this day"). And they have compelled state prosecutors to defend a conviction that was final some 40 years ago.

3. *Thomas Arthur*. The lead amicus here, Alabama, has long dealt with a less famous, but no less false, claim of actual innocence. Thomas Douglas Arthur killed his girlfriend's husband in 1982. The evidence of guilt has always been overwhelming. Arthur's girlfriend, who was also convicted of the murder, initially told the police that she had been raped and that the rapist killed her husband. In fact, as she later testified, she and Arthur conspired to kill her husband and intended to split her husband's life insurance proceeds. This was Arthur's second murder; he was on work-release from his first sentence when he committed it.

Because of procedural errors, Arthur was tried and convicted for the murder three times. At the conclusion of Arthur's third trial in 1991, Arthur personally asked the jury to recommend that the judge sentence him to death. Arthur told the jury that he "wouldn't dare ask you for it if I thought for a minute that I would be executed." *State of Alabama v. Arthur*, Trial Tr. at 1181, CC-87-577 (Jefferson Cnty. Cir. Ct. 1991). Instead, Arthur told the jury that he had already managed to overturn his capital murder conviction on two previous occasions and that, if he was sentenced to death, he would be in a

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[3] Available at http://www.dailymail.co.uk/news/article-1111444/I-know-Bobby-Kennedys-murder-actor-friend-Robert-Vaughn.html (last visited August 20, 2012).

better position to challenge his latest conviction too. The jury, and then the judge, obliged his request.

Since then, Arthur has made good on his promise to the jury. After his normal avenues of post-conviction litigation ran out, Arthur filed both an untimely federal habeas action and a civil rights action, in which he alleged his "actual innocence" and requested a DNA test of the rape kit used to examine his girlfriend-accomplice. Both actions were eventually dismissed. *See Arthur v. Allen*, 452 F.3d 1234, 1253-54 (11th Cir. 2006); *Arthur v. King*, 500 F.3d 1335, 1342 (11th Cir. 2007). The Eleventh Circuit noted that Arthur's civil rights action came very late in the process:

> [It was] filed twenty-five years after the crime, fifteen years after his third conviction and death sentence, nine years after the conclusion of his appeals on direct review, five years after the conclusion of his state postconviction proceedings, six years after the initial filing of his federal habeas petition, and four days before the Supreme Court denied his petition for writ of certiorari of his federal habeas petition.

Arthur v. King, 500 F.3d at 1342.

Even though the courts universally concluded that "there was ample evidence linking Arthur to [the] murder," *id.*, Arthur's "actual innocence" claims attracted public support. The Birmingham News has editorialized that "[i]t's inconceivable that the state of Alabama won't order DNA testing before executing a Death Row inmate who claims to be innocent." *DNA Testing for Arthur*, BIRM. NEWS (Nov. 29, 2007). The Atlantic has called Arthur's "excruciating case . .

. an ugly case, tracking many of the failings of the human condition." *Another Death Row Debacle: The Case Against Thomas Arthur*, THE ATLANTIC (Feb. 27, 2012).

Then, three days before his execution date, Arthur filed a successive state post-conviction petition that again alleged his "actual innocence." Arthur relied on newly discovered evidence—namely, a signed and notarized confession from another convicted murderer, Bobby Gilbert, asserting that Gilbert had raped the girlfriend-accomplice and committed the murder. *See Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010). The Alabama Supreme Court issued a last-minute order staying Arthur's execution so that this successive petition could proceed. *Id.*

The trial court conducted an evidentiary hearing, at which the "State presented overwhelming evidence that Gilbert's affidavit is false and that Gilbert and Arthur conspired to fabricate the affidavit." *Id.* at 744. Nonetheless, the court "in abundance of caution" directed the State to "conduct D.N.A. testing on the available physical evidence in this case." *Id.* at 739. Unsurprisingly, the testing was not exculpatory—the only available DNA belonged to the victim, not Gilbert. *Id.* at 740. Arthur appealed all the way to this Court, which denied his cert petition last year. *See Arthur v. Alabama*, 132 S. Ct. 453 (2011).

For his part, Arthur is currently proceeding with yet another civil rights action challenging Alabama's three-drug execution method. *See Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. Mar. 21, 2012). There is little doubt that he has his next "actual-innocence"

habeas petition prepared and ready to file when that civil rights litigation ends. The tolling rule at issue here can only assist his decades-long effort to thwart the imposition of his sentence.

* * *

The States' interests in finality and efficiency outweigh the interest of prisoners in raising untimely claims in habeas, not only upon the discovery of new evidence, but more than one year after the new evidence is discovered. The rule adopted by the Sixth, Ninth, Tenth and Eleventh Circuits undermines the States' interests, gives convicted criminals like Coleman, Sirhan, and Arthur a new avenue to abuse the system, and threatens a return to the days before Congress enacted the one-year statute of limitations. The amici States respectfully request that the Court grant the Warden's petition and reverse the Sixth Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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REPLY BRIEF

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In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition raises two questions of jurisprudential significance: (1) whether equitable tolling is available when a habeas petitioner asserts an actual-innocence claim but cites no extraordinary circumstances that prevented timely filing; and (2) whether a habeas petitioner must exercise reasonable diligence in pursuing an actual innocence claim to receive the benefit of equitable tolling. On the latter issue, this Court's decision in *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010), seems dispositive. In *Holland*, this Court held that a habeas petitioner seeking to equitably toll AEDPA's statute of limitations must demonstrate that he has been pursuing his rights diligently. *Id.* Accord, e.g., *Flanders* v. *Graves*, 299 F.3d 974, 978 (8th Cir. 2002) (petitioner claiming equitable tolling of § 2244's limitation period based on an actual-innocence claim must show "that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.").

But the circuits have split on the question of whether due diligence applies to innocence-based claims for equitable tolling. In response, Perkins suggests that *Holland* requires the circuit courts to recognize innocence-based tolling. He also argues that *Holland*—and other cases from this Court addressing equitable tolling—have never required a petitioner to act diligently when asserting actual innocence. Perkins notes that the post-*Holland* "trend" demonstrates that there is not a true circuit split and that this Court's intervention in the issue is not necessary. Br. in Opp. 6–10. But this argument fails for three reasons.

First, Perkins misapprehends the interplay between equitable tolling and 28 U.S.C. §§ 2244(b)(2)(B) and (d)(1)(D). The entire purpose of equitable tolling is to provide habeas petitioners with additional time to file their claims when an extraordinary circumstance prevents them from filing on time. That is precisely what the statute does in the case of actual innocence. Under § 2244(b)(2)(B), a habeas petitioner is granted an additional 365 days to pursue his claims once he discovers, or with reasonable diligence should have discovered, evidence of his actual innocence. That time is provided by statute even when the petitioner has already filed a prior petition. 28 U.S.C. § 2244(d)(1)(D). In other words, the statute itself serves the same purpose as equitable tolling.

Second, Perkins misinterprets this Court's actual-innocence jurisprudence. Perkins places great weight on the fact that this Court has never held that a habeas petitioner who is actually innocent must diligently pursue his claims. But that is because the issue has never been presented. All of the cases cited by Perkins and the Sixth Circuit below involved circumstances where the petitioner *had* diligently pursued his actual-innocence claim. Those cases failed to address a myriad of irrelevant claims. Perkins is now attempting to parlay this Court's silence on irrelevant issues into a statement of the law. But the question of whether diligence is required remains a live question that has divided the circuits. This Court should grant the petition to resolve that split.

Third, this Court should decline Perkins' invitation to ignore those circuit court decisions that pre-date *Holland*. In *Holland*, this Court acknowledged that it

was adopting a rule that had been recognized by all eleven Courts of Appeals that had considered the issue of whether the statute of limitations under AEDPA could be equitably tolled. By Perkins' own admission, the Court did not decide the diligence question. But it did state, in general, that a petitioner is only entitled to equitable tolling if "he has been pursuing his rights diligently." *Holland*, 130 S. Ct. at 2562. That is exactly the rule of law that was applied by the Third, Seventh, and Eight Circuits prior to *Holland*. This Court should reject Perkins' suggestion to simply ignore those circuit decisions that give rise to the conflict requiring resolution.

The petition for a writ of certiorari should be granted.

ARGUMENT

I. The Court should grant the petition to resolve whether equitable tolling based on actual innocence is necessary to give a habeas petitioner additional time to file when the statute provides that petitioner has an additional 365 days to file based on the time he discovers evidence that he was actually innocent.

Perkins's primary argument is that this Court's decision in *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010), supports the Sixth Circuit's conclusion that a claim of actual innocence tolls the statute of limitations without a showing of an extraordinary circumstance that prevented the habeas petitioner from timely raising the claim. Br. in Opp. 11–14. According to Perkins, 28 U.S.C. § 2244(b)(2)(B) and § 2244(d)(1)(D)

address triggering the statute of limitations, as opposed to tolling. Br. in Opp. 12. Because "tolling" is not expressly mentioned, Perkins reasons that AEDPA does not contain the "clearest command" against such tolling. *Holland*, 130 S. Ct. at 2560.

But Perkins misses the point. Equitable tolling excuses an untimely habeas petition based on the existence of some "extraordinary circumstance" that prevented timely filing. *Holland*, 130 S. Ct. at 2562. And excusing a late filing is exactly what AEDPA already provides to habeas petitioners. No matter how much time has passed, the statute of limitations resets to "zero" once a habeas petitioner discovers—or should have discovered through the exercise of due diligence—evidence of his actual innocence. 28 U.S.C. § 2244(d)(1)(D). That is, Congress has provided habeas petitioners an additional 365 days to file a habeas petition where an extraordinary circumstance—the late discovery of evidence establishing his actual innocence—rendered the petitioner unable to file his habeas in a timely manner.

Congress provides a mechanism by which to excuse the untimely filing of a second habeas petition. Under 28 U.S.C. § 2244(b)(2)(B), Congress lifted AEDPA's prohibition on successive petitions where the facts underlying a new claim would establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. Thus, Congress has provided habeas petitioners the same additional time to file a petition that would ordinarily be covered by equitable tolling.

Perkins' attempt to create an artificial distinction between tolling and triggering of a new limitations

period is foiled by the statutory plain language. This Court should grant certiorari to consider whether equitable tolling based on actual innocence is necessary to give a habeas petitioner additional time to file when the statutory scheme already provides that petitioner an additional 365 days after he discovers evidence that he was actually innocent.

Perkins also tries to "undo" the circuit conflict by selectively citing decisions of the First, Fifth, and Seventh Circuits. Br. in Opp. 6 (citing *Riva* v. *Ficco*, 615 F.3d 35, 44 n.4 (1st Cir. 2010); *Price* v. *Thaler*, 354 F. App'x 846, 847 (5th Cir. 2009); *Flanders* v. *Graves*, 299 F.3d 974, 978 (8th Cir. 2002)). That effort fails.

Riva expressly acknowledged the Third Circuit's previously-articulated skepticism regarding use of an actual-innocence claim to "override the AEDPA's limitation period" and merely remanded to the District Court for further consideration. 615 F.3d at 44 n.4. *Price* is an unpublished decision that erroneously stated that there was no Fifth Circuit precedent addressing "whether actual innocence may equitably toll the [AEDPA] statute of limitations." 354 F. App'x at 847. In fact, the Fifth Circuit in *Cousin* v. *Lensin*, 310 F.3d 843, 849 (5th Cir. 2002), held that claims of innocence do *not* justify equitable tolling of § 2244(d)'s limitations period. And while it is true that the Eighth Circuit in *Flanders* declined to say that actual innocence can *never* be relevant to equitable tolling, 299 F.3d at 978, it limited such circumstances to those beyond the habeas petitioner's control. *Id.* But in those circumstances, § 2244(d)(1)(D) would toll the limitations period and render equitable tolling unnecessary anyway. This Court should resolve the conflict.

II. This Court should grant the petition to resolve whether allowing claims of actual innocence to be heard without a showing of reasonable diligence is consistent with AEDPA.

Perkins says that certiorari is also inappropriate because the Sixth Circuit's decision that a habeas petitioner need not show diligence is consistent with this Court's actual-innocence jurisprudence. But again, Perkins misses the point. This Court has not yet addressed the question of whether a habeas petitioner must diligently pursue his claims of actual innocence because this Court's actual innocence cases *all* involve diligent petitioners.

This Court's decision in *Holland* could not be more clear: to obtain equitable tolling, a habeas petitioner must have been "pursing his rights diligently." *Holland*, 130 S. Ct. at 2562. The Sixth Circuit avoided this clear language by citing a "tension" between *Holland* and this Court's line of cases addressing actual innocence as a gateway to review procedurally barred claims without imposing additional requirements. *House* v. *Bell*, 547 U.S. 518, 536–537 (2006). This Court did not address reasonable diligence in the *House* line of cases because diligence was not at issue. The petitioners in *House* and *Murray* v. *Carter*, 477 U.S. 478, 496 (1986), each filed their habeas petitions *on time* and, therefore, diligently pursued their actual innocence claims. This Court did not address issues that were irrelevant to the disposition of those cases. One of the legions of irrelevant issues was whether a habeas petitioner must diligently raise his claim of actual innocence. Perkins attempts to parlay

this Court's silence on an irrelevant issue into a rule of law.

As noted in the State's petition, whether a habeas petitioner has to demonstrate that he diligently pursued his claim of innocence depends on where he lives. Petitioners in the Third, Seventh, and Eighth Circuits must demonstrate due diligence. But those in the Second, Sixth, Ninth, Tenth, and Eleventh Circuit can raise their claims at any time—in this case a decade after the evidence of actual innocence came to light. And all of the decisions recognizing an actual-innocence exception to the due-diligence requirement conflict directly with this Court's admonition in *Holland* that a habeas petitioner must pursue his rights diligently.

Again, Perkins tries to undo the circuit conflict, this time by arguing that all of the contrary circuit decisions on the reasonable-diligence issue pre-date *Holland*. Br. in Opp. 9. But after this Court in *Holland* made clear that a petition is entitled to equitable tolling "only if he shows . . . that he has been pursuing his rights diligently," 130 S. Ct. at 2562, those circuits that require reasonable diligence to invoke equitable tolling based on actual innocence would likely view their precedents as *strengthened*, not diminished. Perkins fails to explain why the opposite would be true.

In sum, the importance and recurring nature of the questions presented and the uncertainty in the law that the splits of authority create counsel strongly in favor of granting the petition.

III. *Holland* did not resolve the conflict between the circuits.

Perkins encourages this Court to simply ignore circuit court decisions that pre-date *Holland* and deny certiorari because the "clear, post-*Holland* trend favors the decision of the Sixth Circuit." Br. in Opp. 11. But in nearly the same breath, Perkins admits that "*Holland* did not squarely address whether reasonable diligence must be demonstrated before a habeas petitioner may seek innocence-based equitable tolling." Br. in Opp. 9–10. And Perkins ignores that the two prerequisites to equitable tolling that *Holland* announced—extraordinary circumstances that prevented a timely filing and a habeas petitioner's diligent pursuit of his rights—run exactly opposite to the circuit decision below and in many other post-*Holland* cases. Perkins has failed to articulate a rational reason why this Court should continue to ignore a clear split between the circuits.

Perkins admits that *Holland* did not squarely address the question of whether a habeas petitioner must diligently pursue his innocence-based equitable tolling claim. But this Court did declare that a petitioner seeking equitable tolling must demonstrate that "he has been pursuing his rights diligently[.]" *Id.* at 2562. Indeed, a fundamental principle of a Court's equitable power is that the party seeking equity must act in a timely manner, not sit on their rights for a decade. As the Court has held in the context of tolling civil-rights limitation periods, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr.* v. *Brown*, 147 U.S. 147, 151 (1984).

The fact that there is a "trend" in favor of the Sixth Circuit's decision does not make this circuit split go away. Indeed, *Holland* itself does not support this "trend." Rather, the decisions of the Third, Seventh, and Eight Circuits requiring a habeas petitioner to diligently pursue claims of actual innocence are fully consistent with the elementary notions of equity expressed by this Court in *Baldwin County*. More critically, they are consistent with this Court's language in *Holland* requiring a habeas petitioner to demonstrate that he diligently pursued his claim. Thus, the pre-*Holland* circuit court decisions were buttressed—not contradicted—by this Court's decision in *Holland*.

The fundamental disagreement between the circuits regarding the meaning of *Holland* demonstrates succinctly why certiorari should be granted in this case. On one hand, the language of *Holland* itself seems consistent with the rule set forth by the Third, Seventh, and Eighth Circuit. On the other hand, the "trend" of cases following *Holland* indicates that several circuits—like the Sixth Circuit—interpret *Holland* not to apply to claims of actual innocence. These positions are entrenched and there is no reasonably likelihood that the circuit split will resolve itself. The importance of the question presented and the uncertainty in the law that the split of authority creates counsel strongly in favor of granting the petition.

This Court should grant the petition and decide whether *Holland*'s due diligence requirement is universal or whether claims of actual innocence should be treated differently for purposes of equitable tolling.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

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JOINT APPENDIX

RECORD
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No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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The following opinions and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

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For the Sixth Circuit JUDGMENT
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Relevant Docket Entries from the United States District Court for the Western District of Michigan, 2:08-cv-00139-RHB-TPG

6/13/2008	1	Petition for writ of habeas corpus filed by Floyd Perkins
8/29/2008	6	Amended petition for writ of habeas corpus (cure insufficiency) filed by Floyd Perkins
6/18/2009	11	Opinion adopting report and recommendation
6/18/2009	12	Judgment adopting the report and recommendation of the magistrate judge as clarified by the opinion entered this date. The habeas corpus petition is denied and petitioner is denied a certificate of appealability
7/1/2009	13	Notice of Appeal

Relevant Docket Entries from the United States Court of Appeals for the Sixth Circuit, No. 09-1875

9/14/2009	8	Appellant motion filed by Floyd Perkins to grant a certificate of appealability
2/24/2010	9	Order filed to grant in part and deny in part a certificate of appealability
3/1/2012	34	Opinion and judgment filed: reversed and remanded
3/15/2012	36	Petition for en banc rehearing filed
4/26/2012	39	Order filed denying petition for en banc rehearing
5/1/2012	40	Motion filed to stay mandate
5/3/2012	41	Order filed granting motion to stay mandate

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

PEOPLE OF THE
STATE OF MICHIGAN, *

-vs- * NO: 93-48430-FC

FLOYD PERKINS, * JUDGE FREEMAN

Defendant. * II OF IV

* * * * * * * * * * * * * * * * *

VOLUME II

Transcript of proceedings had in the above-entitled cause before the HONORABLE DONALD R. FREEMAN, Circuit Court Judge, on August 6, 1994, at Flint, Michigan.

APPEARANCES:

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REPORTED BY: Jacqueline M. Kontorousis
CSR-4671, AssociatedReporters

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* * *

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{Q = Direct Examination by Mr. Stamos}
{A = People's Witness Marvin Mays}

page 9 and then go to page 10. When you're reading that, see if it refreshes your memory.

A (Pause.) Yes.

Q And these are things that you thought would be significant for the police to know; weren't they?

A Yeah.

Q Now, I'm going to ask you directly. How often would Floyd talk about killing people? I want to know from your own mouth how often and what he would say.

A Various times when we were together, probably drinking, just said, we would shoot somebody or we would stab them and, you know, what we would do with the body and just kidding around, just talking.

Q Let me read--You just read it. And you didn't tell the police anything about we; did you?

A No.

Q You told the police that Floyd Perkins had talked a lot about killing people; didn't you?

A Yes.

Q Is that a yes or a no?

A Yes.

Q As a matter of fact, he even told you how he would do it; didn't he?

A Yes.

Q And how did he tell you he would do it?

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A He would stab them and put them in a car.

Q And where did he tell you he would stab?

A Chest, just various places.

Q Now, hold it. What did you tell the police were the places he told you he would stab? Do you want to look at it again?

A Yeah.

Q Page 10. Let me ask this question: Did you get a chance to read it?

A Yes.

Q I want you to speak right up so that all this jury can hear you; do you understand?

A Yes.

Q Now, the question is where did Floyd Perkins tell you that he would stab them?

A In the head.

Q Thank you. And then did he tell you what he would do after he would stab them in the head?

A Drag the body off.

Q Pardon?

A Drag the body off into the field.

Q And then did he tell you how he would act after this was done?

A Like nothing happened.

Q Pardon, speak up.

[Page 121]

A Like nothing happened.

Q That he would go home and do what?

A Just sit around and watch T.V. and be himself.

Q And act like nothing happened?

A Right.

Q He told you that?

A Yes.

Q Now, there came a time--You remember, when the body of Rodney Henderson was found; don't you?

A I wasn't there.

Q I understand that. The question was you remember, though, when the body of Rodney Henderson was found; don't you?

A Yes.

Q And before the body--Just answer this yes or no. Before the body of Rodney Henderson was found, there were people talking in the neighborhood in the area about what had happened to Rodney and where Rodney was; isn't that true?

A Yes.

Q You knew about that; didn't you?

A Yes.

Q You were wondering where Rodney Henderson was; weren't you?

A Yes.

* * *

[Page 131]
{Q Cross-examination by Mr. Hayman}
{A People's witness Marvin Mays}

A After I asked him, was he dead, I asked him, how did he die, and he said he didn't know. And I asked him, have you seen him? And he told me, the last time he seen him was at the store. And then I asked him, have you seen Torry, and he said, no.

Q So he told you that the last time that he saw him was at the store; is that correct?

A Yes.

Q Now, were you at this house on Marja, say, the night before? Were you at the house on Marja Street?

A No.

Q Now, do you know anything about some clothing that DaMarr Jones had? Do you know anything about any clothing that DaMarr Jones had?

A Yes, some clothes.

Q Do you know anything about some clothing that DaMarr had that had been taken to the cleaners?

A Not until later on that week.

Q Tell me what you know, what you know about that.

A I had heard that DaMarr --

Q I don't want to know what you had heard. My question is about some clothing.

A Have I seen the clothes?

Q Yes.

A Just the jacket.

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Q What jacket did you see?

A It's a multi-colored jacket, I believe.

Q A multi-colored jacket?

A Yes.

Q Tell me what you had saw about the jacket.

A It appeared to be some blood on the jacket.

Q Where was the blood at?

A Part of the sleeves, chest part, in the chest part.

Q And who had you seen wearing that jacket?

A Mostly DaMarr.

Q DaMarr who?

A I don't know his last name.

Q But you had seen DaMarr wearing this jacket; is that correct?

A Yes.

Q And when did you see it--In relation to when you found out Rodney was dead, how many days or hours had it been after that that you saw the jacket?

A Probably close to a week later.

Q And where did you see the jacket?

A Over at Chauncy Vaughn's house.

Q And how is it you saw this jacket at Chauncy Vaughn's house?

A He told me that the last jacket that he seen was the one that DaMarr was wearing.

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MR. STAMOS: I'm going to object. Mr. Hayman knows that's hearsay.

MR. HAYMAN: That wasn't my question, Judge. My question was: Where?

THE COURT: Don't tell us what somebody else has told you, please.

Q (By Mr. Hayman, continuing:) So you saw the jacket at Chauncy Vaughn's house; is that correct?

A Yes.

Q Where in his house?

A Down in the basement.

Q Was it hanging up, or where exactly was it?

A I didn't see.

Q Who did you see--Who produced the jacket for you to see, if anyone?

A Chauncy.

Q So Chauncy produced it; is that correct?

A Yes.

Q Do you know anything about any clothing that DaMarr Jones wore that was taken to the cleaners?

A No, not until later.

Q At some point you did learn of some clothing that DaMarr Jones was wearing that was taken to the cleaners; is that correct?

A Yes.

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Q What items were taken to the cleaners?

MR. STAMOS: I'm going to object. Mr. Hayman knows that has to be hearsay too.

THE COURT: Find a foundation for this, if you will, Counsel.

Q (By Mr. Hayman, continuing:) Did you see the clothing at the Laundromat, the cleaners?

A No.

Q Did someone--someone told you that; is that what you're saying?

A Yes.

Q Have you seen the other articles of clothing at all?

A DaMarr's?

Q Besides the jacket that you've already testified to, have you seen any other articles of clothing of DaMarr Jones?

A No.

Q Now, do you have any personal knowledge of a fight that occurred between Rodney and your cousin, Torreano?

A No.

Q When Mr. Perkins was talking to you about this, you know, what he would do to people or when the prosecution was questioning you about it, did you guys ever specifically talk about Rodney Henderson?

A No.

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Q So his name was not specifically mentioned; was it?

A No.

Q Was Rodney a friend of yours?

A I just knew him. Mostly he was all right. He just came by and spoke.

Q Did you provide the police with a pair of pants?

A Yes.

Q Tell us about the pants that you provided to the police.

A They asked me, have Floyd left any articles at the house? I responded by saying there's a pair of pants that I thought was his because I knew they weren't mine. And I just gave it to him and that was it.

Q Were those his pants?

A I seen him in them before, but I'm not sure if they were his pants, but we were the only two people that stayed there, so I know they weren't mine, they weren't mine.

Q Did you provide the police with anything else at all, any other articles of clothing or anything?

A Someone told me--

Q No, I'm not asking what--

A A pair of boots.

Q You provided them with a pair of boots; is that correct?

A Yes.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

PEOPLE OF THE
STATE OF MICHIGAN, *

-vs- * NO: 93-48430-FC

FLOYD G. PERKINS, * JUDGE FREEMAN

Defendant. * VOLUME III OF IV

* * * * * * * * * * * * * * * * *

VOLUME III

Transcript of proceedings had in the above-entitled cause before the HONORABLE DONALD R. FREEMAN, Circuit Court Judge, on August 10, 1993, at Flint, Michigan.

APPEARANCES:

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EXHIBITS:

None.

* * *

[Page 6]
{Q = Direct Examination by Mr. Stamos}
{A = People's Witness Dr. Dewitt}

time.

Q Directing your attention back to March 7th of 1993, sometime around 10:00 o'clock in the morning, did you have occasion to perform an autopsy on a body that had been identified to you as the body of Rodney Henderson?

A I did.

Q And when you performed these autopsies, did you first do an external examination and then an internal examination?

A That's correct.

Q Now, on the external examination, did you make some estimate of his height and weight?

A I did. I measured him at 171 centimeters, which is nearly 5'9".

Q And what was his weight?

A His weight was approximately 140 pounds.

Q And could you tell the jury the injuries that you observed on the external examination? And I'd like you to do it from the neck down first. And then I'd like you, after that, to concentrate from the neck up.

A Below the neck, there were, in essence, four major wounds, two on the front and two on the back. If you can picture a wound on the right shoulder, anterioral front. And then a wound to the left chest above the

[Page 7]

nipple. And then there were two, more similar wounds on the back, one on the left upper back near the shoulder-blades, and the one right upper back just to the right of the shoulder-blade.

Q Now, in terms of those wounds, what type of wounds did they turn out to be in your opinion, if you combine your external and your internal examination?

A Combine that with what we saw internally, the two on the left side, that's the left front and the left back, represented significant stab wounds with penetration into the chest cavity. The other two involved only soft tissue without penetration. All were stab wounds but of different severity.

Q Now, those were the wounds from the neck down; am I correct?

A That's correct.

Q Now, let's take the wounds from the neck, including the neck area, and the head area. Tell us about those.

A First of all, there was a really major wound involving the left eyelid and extending onto the forehead near the right eyelid, extending onto the forehead. This represented a large wound externally and then had penetration beneath it.

In addition to that, there were multiple other wounds. There were two to the right face that were

[Page 8]

relatively superficial near the chin. There were two to the left face near the angle of the jaw and the ear region. There was one on the left cheek that was relatively superficial and didn't penetrate very far. And that had two long linear stretches associated with this.

There was a rather major wound just to the left of the lower lip, some cheek region. The chin region had three conspicuous, transverse, superficial scratches across it.

Q I want to stop you for just a moment, because I noticed that you've referred to some of these wounds as scratches, that type of thing, and others as major wounds. Let's just stay for the moment with the major wounds. And I want you to describe to the jury what you mean by major wounds.

A Obviously, those that have, at least, penetrated the skin. Those that were, as I used the term superficial, more scratch-like

Q And I'm going to get into those--

A --as opposed to those that actually penetrated skin.

Q I'm going to get into those in your opinion in terms of those after we talk about the major wounds. I want you to combine your internal and your external examination and tell the jury about the major wounds and what they

[Page 9]

amounted to in the neck and the head area.

A Really, the first one I enumerated was really the major wound.

Q Tell us about that.

A That was the one, the eyelid region, that internally penetrated through the skull in the brain.

Q And what kind of wound was that?

A That was a stab wound characteristic. It had an external appearance and injury pattern.

Q And it penetrated what?

A It actually went through what we call the roof of the orbit, the skull bone behind the eye, and it passed into brain substance.

Q So it was basically a stab wound to the eye?

A It missed the eye itself, the soft tissue just above and behind it.

Q And what other major wounds were there to the head and neck area, Doctor?

A As I said, that was really the major wound in terms of cause of death. There was an impressive wound to the neck which was 14 centimeters, which is nearly five inches across the front of the neck that passed through skin and through the muscles at each side but did not involve major vessels.

Q Let me stop you, because I want the jury to understand

[Page 10]

the injuries. I'm not talking about just what caused the death. I want the jury to understand and be able to visualize these injuries. So let's start with the neck. How long of an injury was to the neck?

A Fourteen centimeters, which is about five inches. And we all have a muscle that runs on an angle here. And it runs from each of those the entire distance across the front.

Q How deep was it?

A It went through the skin superficially into the underlying soft tissue but not deep enough to hit vessels or airway.

Q How wide did it open up?

A It was just gapping a short distance here.

Q Approximately how wide?

A Centimeter max.

Q And what did that appear to you to be?

A Well, it represented injury that was not extreme force. It didn't look like a deliberate attempt to really slash the neck.

Q What did it look like?

A It and many of the wounds looked like there was an element of restraint applied; that is to say, combined with the scratches, more or less, one might say an attempt to get someone's attention.

* * *

[Page 20]
{Q = Direct Examination by Mr. Stamos}
{A = People's Witness Dr. Dewitt}

the one wound to the eye area as penetrating the brain; right?

A That's correct.

Q How many other wounds were there to the neck and head area?

A There were an additional nine wounds.

Q All right. I want to take each one of those one at a time, okay. Now, you've already described, let's call this the second wound, you have described the one to the neck. I want you to describe it again.

A The wound to the neck was superficial, 14 centimeters in length. And it passed from one muscle to the other muscle going through skin and into superficial soft tissue involving blood vessels.

Q How deep was it?

A Just a matter of millimeters.

Q Where's the next wound, the third wound, just for the sake of naming them?

A There's one on the left cheek, prominent to the cheek region.

Q All right, describe that.

A That was a small wound with relatively little extension into the underlying soft tissue just penetrated skin.

Q Just penetrated skin. What was that made with; could you tell?

* * *

[Page 27]
{Q = Direct examination by Mr. Stamos;
Cross examination by Mr. Hayman}
{A = People's witness Marvin Mays, Jr.}

THE COURT: You're still under oath. You may resume the stand, if you will please. Give us your full name.

THE WITNESS: Marvin Mays, Jr.

DIRECT EXAMINATION

BY MR. STAMOS:

Q Marvin, last Friday you were on the stand. And I had asked you the question about Mr. Perkins telling you how he would kill people, remember when I asked you that?

A Yes.

Q And your testimony was that he would stab them in the head area?

A Yes.

Q Did he also use a word for what he would do to these people?

A Torture them.

MR. STAMOS: Thank you.

THE COURT: Cross-examination on that point?

MR. HAYMAN: I do want to question him, thank you.

CROSS-EXAMINATION

BY MR. HAYMAN:

Q Mr. Mays, the statement that the prosecutor just questioned you about and your response, that's what you gave to the police when they questioned you; is that

* * *

[Page 34]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Chauncy Vaughn}

Q (By Mr. Stamos, continuing:) Were you also acquainted with Rodney Henderson?

A Yes.

Q Were you acquainted with Marvin Mays and Torreano Player?

A Yes.

Q And a person by the name of Eric Lang? Maybe I've got the name wrong. I'm sorry, Eric Larry.

A Yes.

Q And DaMarr Jones?

A Yes.

Q And was there a home on Marja Street that a particular group of people would go to quite often?

A Yes.

Q And was it this group of people that I have just talked about in terms of who you were acquainted with?

A All expect one, Eric Larry.

Q He wouldn't go there?

A No, he wasn't there.

Q Are you related to any of these people?

A No.

Q Now, I'm talking about prior to March 4th of 1993, had Floyd Perkins ever told you anything about how he felt in terms of Rodney Henderson?

A Well, only he thing he really said was that he didn't

[Page 35]

care for him.

Q Did he say why he didn't care for him?

A No, sir.

Q Did he ever tell you--and I'm talking about Floyd Perkins--Prior to March 4th, 1993, had Floyd Perkins ever told you or mentioned to you anything that he might do to Rodney Henderson because of his feelings towards him?

A Yes.

Q And what was that?

A Said he was going to kill him.

Q How many times had he told you that approximately?

A Well, I can't really recount that. I really don't remember.

Q Was it more than once, though?

A Yes.

Q Now, talking about March 4th of 1993, I think that would have been a Thursday, did you have occasion to see Rodney Henderson? To get you in the time frame, this would be the day that everybody met over to Marja when Rodney and DaMarr Jones and Floyd Perkins left the Marja Street address together. Do you remember that day?

A Uh-huh.

Q When was the first time you saw Rodney Henderson that

[Page 36]

day?

A About 4:45, close to 5:00 o'clock.

Q Could you tell us where it was that you saw him?

A My house.

Q That was over on Baldwin Street?

A Yes.

Q Did anybody else come over to your house other than Rodney?

A Yes.

Q Who?

A Floyd Perkins.

Q Anybody else?

A No.

Q Did the three of you go anywhere?

A Yes.

Q Could you tell us where you went?

A We went on Marja Street.

Q About what time?

A I'd say about 7:00.

Q And could you tell us who was all at Marja when you got there?

A Yes, my younger brother.

Q Your younger bother, what's his name?

A Yes, Tavar Louis. Detrice Younger, DaMarr Jones. I really don't recall the girls' names that were

* * *

[Page 39]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Chauncy Vaughn}

the bottom. Read it to yourself, if you don't mind. (Pause.) Does that help you?

A Yes.

Q Tell the jury what, basically, his exact words were.

A Okay. Everybody called me Chuck, that's my nickname. He said, hey, Chuck, I'm going do it, go ahead and do it. I said, do what? Go ahead and get it over with.

Q And did you know what he meant?

A Yes.

Q Why did you know what he meant?

A Because he had been referring to it, you know. He said it a couple times, but, you know, as us being close friends, I really didn't pay no attention to it.

Q You knew what he meant because of what he had told you in the past?

A Yes, sir.

Q He said what, again, I'm not sure I heard you?

A He said, I'm going do it, Chuck, I'm going to go ahead and get it over with.

Q Did he mention Rodney's name at all?

A Yes.

Q Was DaMarr Jones present during any of these conversations about Rodney Henderson?

A I don't really recall.

Q Did you say anything to Floyd Perkins when he told you

[Page 40]

what he was going to do to Rodney Henderson?

A I don't remember really, you know, what all went on that night.

Q Do you remember telling him anything, though?

A Ugh-uh.

Q I want to you show you page 11 of your statement to the police, just to see if it refreshes your memory. Right here is what I'm referring, but you can read anything else.

(Pause.) Did that help you in terms of what you told Floyd Perkins?

A Yeah.

Q What did you tell him?

A I told him not to do it.

Q Now, how well did you know Floyd Perkins? I mean, how long had you known him?

A About four or five years.

Q And how long had you known DaMarr Jones?

A About three.

Q Did you observe--And tell me before you answer this, if you can answer it or not, before we actually get into the answer, was there any special relationship that you observed over this period of time between Floyd Perkins and DaMarr Jones?

A No.

* * *

[Page 53]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Chauncy Vaughn}

where he was going?

A Yes.

Q Where?

A They said they was--First they went to his house, then they came back through a path, they said.

Q Where was the path at?

A Dukette Trial.

Q Floyd Perkins told you he was going to go there?

A Yes.

Q Did Floyd Perkins tell you about this Dukette Trail after he had said what he was going to do to Rodney Henderson?

A I had been through there before.

Q Listen to my question. Did Floyd Perkins tell you about going over to the Dukette Trail, you know when they were leaving, did he tell you this before or after he had told you about what he was going to do to Rodney?

A After.

Q When the three of them left, did you ever see Rodney Henderson alive again?

A No, Sir.

Q Did you ever see DaMarr Jones or Floyd Perkins again?

A Yes, I did.

Q How long after that and where?

A It was about an hour later, hour and-a-half later at my

[Page 54]

house.

Q You had went back home?

A Yes.

Q Tell us how you happened to see DaMarr Jones and Floyd Perkins again.

A They came by my house.

Q And did Floyd Perkins say anything about Henderson?

A Yes.

Q What did he say?

A It's done.

Q Pardon?

A It's done.

Q Did he say anything more than that?

A I really don't recall.

Q Do you remember telling Floyd anything about Rodney Henderson?

A No, sir.

Q Do you remember if they did anything, both DaMarr Jones and Floyd Perkins, while they were at your house other than talk?

A Yes. They went to the rest room.

Q And did what?

A I was not with them, sir. I heard water running, so I concluded they washed themselves off.

Q It was water other than bath or toilet flush?

[Page 55]

A Yes, faucet water.

Q And they both went in there together?

A Yes.

Q How soon after they got to your home did they go into the bathroom?

A Like a couple minutes after that.

Q Were you able to see anything that resembled blood at all on them?

A I was standing away from them.

Q So you didn't see anything?

A I did not, that I recall.

Q How long did they stay at your home?

A No more than about 10 minutes.

Q And what did you do after they left? Did you do anything?

A I just sat back and thought to myself. I really didn't believe it.

Q Pardon?

A I didn't believe what he had said. So I thought to myself, I was hoping that Rodney would come back over, like he usually would.

Q Did there come a time the next day when you got in contact with Torreano Player?

A Yes.

Q Had you been looking for Rodney that day?

[Page 56]

A Yes.

Q Had you found him?

A No, sir.

Q Where did you meet up with Torreano Player at?

A On the bus, on the city bus.

Q And your dad drives that bus; does he not?

A Yes, sir.

Q Just answer this yes or no. Had you asked your dad whether he had seen Rodney Henderson?

A Yes.

Q And when you got on the bus with Torreano, what did you tell Torreano?

A I told Torreano exactly what Floyd Perkins had said the night before that.

Q About what?

A About Rodney, when he said it was done.

Q So you told Torreano that?

A Yes.

Q Did you ask Torreano if he had seen Rodney Henderson?

A Yes.

Q Were a lot of people looking for Rodney Henderson?

A Yes.

Q Now, on Saturday, that is the day after you told Torreano what Floyd Perkins had told you about Henderson? Do you understand what I'm saying? To get

* * *

[Page 60]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Chauncy Vaughn}

should leave.

Q And when did Floyd Perkins make this statement that you just heard?

A While Torry was in the house. Torry was not present when he said that.

Q And he said--Correct me if I'm wrong, but I'm just making sure I understand--if he couldn't have Torry, his dog, he might as well turn himself in; and dog means Torry, his buddy?

A Yes.

Q And then Torry came back outside?

A Yes.

Q And left with you?

A Yes. We got into my car and left.

Q Did you and Torry look for Rodney Henderson together?

A Yes, we did.

Q Where did you go to look for him at?

A On West Gracelawn, over by--over U Manor Apartments, over in that area.

Q Was this after Torry had talked to Floyd Perkins?

A Yes.

Q Did you find Rodney?

A No, sir.

Q Did there come a time when Floyd Perkins called you on the telephone?

* * *

[Page 62]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Chauncy Vaughn}

A That was Saturday when I heard that.

Q Pardon?

A That was Friday and Saturday, one and-a-half days.

Q One and-a-half days later about?

A Uh-huh.

Q Could it have been two days later?

A It could have been. They say it was Saturday afternoon when they had found his body.

Q And what day was it that you last saw Rodney Henderson leave with--

A That was a Thursday, May 4th.

Q Now, this phone call, do you remember what day that was that you received the phone call from Floyd Perkins?

A I don't recall what day it was.

Q Do you remember if there was any conversation, whether or not Perkins told you anything in terms of Rodney Henderson?

A Yes.

Q What did he tell you?

A Well, Floyd had stated how it was done. He told me--he stated how it was done.

Q How did he tell you it was done?

A Well, he said--Well, it was him and DaMarr and Rodney, they was walking through the path. And he stated that Rodney had slowed down. DaMarr was behind Rodney, and

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he was in front of Rodney. And he said, it's cold.

Q What?

A It's cold.

Q C-O-l-D?

A Yeah.

Q Was there any purpose to that?

A That was supposed to have been a signal.

Q Who said it was cold?

A Floyd.

Q And then what did he tell you?

A And he said that DaMarr turned around. He said he turned around and he had his knife.

Q Who had his knife?

A Floyd. And he said that DaMarr was not ready yet, so they continued on. And he said, it's cold. And that's when he turned around again. And he was ready, and he said DaMarr was ready too. And that is when they completed the assault.

Q Did he tell you how it was done?

A He said he came from behind, stabbed him in the neck, and he fell to the ground.

Q Who came from behind, did he tell you?

A He came from behind.

Q Floyd did?

A Yeah. He was in front. But when he turned around,

* * *

[Page 75]
{Q = Cross-examination by Mr. Hayman}
{A = People's witness Chauncy Vaughn}

A Yes.

Q Now, your testimony was that this address on Marj a street, Mr. Perkins. said to you he was going to kill Rodney; is that your testimony?

A That is my testimony.

Q How is it that came up? Did he just walk up to you and say, I'm going to kill Rodney?

A It just came up of the air.

Q How did it come up out of the air? Where were you at?

A We were all in the bedroom. We were all in there just relaxing, and he just brung it up.

Q When you say you all, who was in the bedroom at that time?

A It was me, Tyrese, my younger brother, and Floyd.

Q So, Mr. Perkins just said, in front of everybody that he was going to kill Rodney; is that correct?

A Yes, that's correct.

Q And Rodney, I think you just said, was a good friend of yours?

A He was a close friend of me.

Q Why didn't you go and tell Rodney what Mr. Perkins said?

A I said to Rodney just to stay with me.

Q You told Rodney just to stay there with you?

A Yes, I did.

Q Did you tell him that Mr. Perkins had said in front of

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all of you, your brother, and the other two individuals in the bedroom that he was going to kill Rodney?

A No, I did not.

Q Why would you not tell him that if he was a close friend of yours, Mr. Vaughn?

A For one, I didn't believe that it would happen, okay.

Q Why didn't you believe that it would happen if you're saying Floyd said this? Why didn't you believe what Floyd was telling you?

A He stated it all the time. We all played with each other like that.

Q So you always--you guys always play with each other like that, saying you're going to do something to each other and not really mean it; is that what you're telling me?

A Yes, that's what I'm telling you.

Q So when Mr. Perkins, as you claim, said this, you took it as a joke and this was part of the game playing that all of you do with each other; is that correct?

A Yes.

Q Was there anything about Mr. Perkin's tone or mannerism that led you to believe that he was going to do this?

A No, it wasn't.

Q Did you see him with any weapons on him that night?

A No, sir.

* * *

[Page 78]
{Q = Cross-examination by Mr. Hayman}
{A = People's witness Chauncy Vaughn}

Q Do you know what time that would have been when they came to your home?

A About 10:00.

Q It would have been 10:00 o'clock, sometime around there; is that correct?

A Yes.

Q No question about that?

A Pardon me?

Q Is there any doubt in your mind about the time?

A No, there's not a doubt, it was 10:00 o'clock.

Q Why are you so sure it was 10:00 o'clock?

A I was on the phone talking to my girlfriend about 10:00 o'clock. I had made it home about 15 until 10:00. I called her and I was on the phone when he arrived.

Q So there's no doubt in your mind about the 10:00 o'clock time frame; is that correct?

A That's correct.

Q Now, when Mr. Perkins and DaMarr came to your home, do you know if DaMarr was wearing a plaid-type jacket?

A Yes.

Q And that jacket you later provided to the police; did you not?

A Yes, I did.

Q How much later, after this incident when you saw DaMarr and Mr. Perkins come to your home, how much after had

[Page 79]

you--how much time had passed before you produced that jacket for the police?

A I'd say about four days.

Q About four days later; is that correct?

A Yes.

Q Had DaMarr been back to your house in between the time that you saw him on this night and the time that you gave this jacket to the police?

A The only way I can answer that question is that he could have came while I was gone.

Q Had you ever seen him come back to your house between that time?

A No, I haven't.

Q You haven't; is that correct?

A That's correct.

Q Did DaMarr go down to the basement of your home when he and Floyd came over that night to your house?

A No, he didn't.

Q Never made it to the basement?

A Not that I remember. The only thing I remember, they went to the rest room and that was it.

Q But you didn't see any blood; is that correct?

A That's correct.

Q And you didn't see any blood in the sink; is that correct?

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A That's correct.

Q In fact, it is not unusual for Floyd to come over to your house, is it, wash his hands, and then go hit your refrigerator; is it?

A No, it is not.

Q He does that quite often; doesn't he?

A Yes, he do.

Q And normally his ritual was to go to the bathroom, wash his hands, and then go to your refrigerator?

A I'm not saying that form or fashion but he would do that.

Q He would wash his hands. and then go to your refrigerator?

A Well, I'm not going to say, he washed his hands every time he came to my house and got in my refrigerator.

Q Have there been occasions where he's washed his hands and then gone to the refrigerator?

A Yes, it is.

Q More than once; hasn't he?

A Yes.

Q So it wasn't anything unusual for you to see him go into the bathroom, wash his hands, and go to your refrigerator; was it?

A No, it wasn't.

Q Now, this jacket that you provided to the police--

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First of all, is the officer in the courtroom who you gave the jacket to?

A Yes, Sir.

Q Would you point to him?

A Sergeant David King sitting behind this gentleman right here.

Q And this jacket that you gave to Sergeant King, did you notice when you handed him this jacket, if it had blood on it?

A Yes, it was.

Q Where did you see blood on the jacket?

A Like up in here, in here.

Q You're pointing to your right chest area; is that correct?

A Yes.

Q How much blood did you see there?

A It was like--You know, I can't really--

Q Could you show us how big--Was it a lot of blood?

A Yes, it was, like a spot.

Q Can you show us how big it was with your hands? How much of an area did it cover?

A Right around in here, something like that. I really don't remember too well.

Q And where did you retrieve this jacket from?

A Out of my room.

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Q Out of your room, in your home?

A Yes, sir, downstairs in the basement.

Q So you have a bedroom in the basement?

A Yes.

Q And that is where you sleep?

A Yes.

Q Was someone else living in the house with you?

A Yes.

Q Who?

A My mother, my sister, and my younger brother.

Q So you were living with your mother at that time?

A Yes.

Q And the jacket was retrieved out of your bedroom; is that correct?

A Yes.

Q Where at in your bedroom?

A Between my locker and the wall.

Q Was it stuffed inside of anything?

A No. It was just stuck between the locker and the wall.

Q So would someone who just casually walked into the room, would they be able to see the jacket?

A No.

Q How is it that you found it?

A Because my mother made me clean up my room that night.

Q When you say that night, that would be the night before

[Page 83]

you gave it to the officer or the night that you gave it to him?

A I said that day.

Q So the day that you gave it to the officer was the day that your mother made you clean up your room?

A I believe so.

Q And you located the jacket as part of cleaning up your room?

A Yes.

Q Did you notice if anything--Did you check the jacket to see if anything was in the pockets?

A No, I did not.

Q Do you recall if there were any gloves with the jacket?

A There was no gloves.

Q You're sure of that?

A I'm positive.

Q And this jacket that you gave to sergeant King, is that the same jacket that you saw DaMarr wearing on the night that he and Floyd Perkins came into the house?

A Yes.

Q Any question about that?

A There's no question.

Q And Floyd wasn't wearing that jacket; right?

A No, he wasn't.

Q Do you know if Floyd had a girlfriend that lived on

* * *

[Page 94]
{Q = Direct Examination by Mr. Stamos}
{A = People's witness Damarr Jones}

A Yeah.

Q Were you going to school last year?

A Yes.

Q Now, did there come a time on Thursday, March 4th of 1993 when you were over to this address, where all of you went on Marja Street--There was a particular home there that some girls lived that the group all hung around a lot; wasn't there?

A Yes.

Q And were you over there with Rodney Henderson and Chauncey Vaughn and Floyd Perkins?

A Yes.

Q Did you hear Floyd Perkins make some statement about what he intended to do to Rodney Henderson?

A Yes.

Q And what was that?

A I'm going to do Rodney.

Q Do you know why he made that statement or why he felt that way about Rodney Henderson?

A No.

Q He said what again?

A I'm going to do Rodney.

Q Just answer this yes or no. Did that kind of language have some particular meaning amongst all of you?

A To me?

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Q Yeah.

A No.

Q What did you think he meant by that, you didn't know?

A I thought he was just playing.

Q Whether you thought he was just playing or not, did it have some particular meaning though? What does it mean, if you know, I'm going to do somebody, whether you're playing or not?

A Kill them.

Q Then that's the meaning you had whether you thought he was joking or not, that's the meaning it had?

A Yes.

Q And did there come a time after you heard that that you left that particular address with some people?

A Yes.

Q Who did you leave with?

A Rodney and Floyd.

Q Why did you do that?

A We was going to the store.

Q Who's idea was it?

A Floyd.

Q Pardon?

A Floyd.

Q Were you guys going anywhere other than to the store?

A No, we did but--

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Q When you got to the store--What store was this, by the way?

A J & P. First we went to the Mike's, and then the J & P.

Q Where was J & P located at?

A Dupont and Paris.

Q How did you get there?

A Walked.

Q When you got there, what did the three of you do?

A Rodney was on the phone, and he went in and got a wine.

Q Who went in and got a wine?

A Floyd.

Q What did you do?

A I went in there.

Q In where?

A In the store.

Q Did you have any conversation inside the store with Floyd Perkins?

A Yeah, he told me that again. He said, like, I'm going to do Rodney. And I was like, chill out, and I started laughing and went out.

Q Did he tell you how he was going to do Rodney?

A No.

Q Was Rodney there when he said that?

A No, he was outside.

* * *

[Page 98]
{Q = Direct Examination by Mr. Stamos}
{A = People's witness Damarr Jones}

Q What do you mean, we didn't know?

A We didn't know the girls. We was following him.

Q He told you to come on, and you just did whatever he said?

A Yeah, we just followed.

Q Who was leading?

A He was, Floyd.

Q And so that's why you went behind Dukette School?

A Yes.

Q Because Floyd went there?

A No, because he was going over to some girls' house or we thought we was.

Q Rut my question was: Why didn't you take the route straight down Dupont to Alma and then east on Alma?

A I don't know.

Q Pardon?

A I don't know.

Q Where were you at in this group? You said Floyd was ahead.

A I was in the middle.

Q And where was Rodney Henderson then?

A In the back.

Q Did there come a time when that changed?

A Yes.

Q Tell us about it.

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A We was up in the trails, he was like, it's cold. And then he said it again but louder.

Q Who said that?

A Floyd. And then he walked back. I was in the front, then Rodney was in the middle, and then he was at the end.

Q Pardon?

A And then Floyd was in the back.

Q So then you're in the front then, Rodney's in the middle, and Floyd Perkins is in the back?

A Yes.

Q Then what happened?

A Then he said it again.

Q Who said it?

A Floyd.

Q Said what?

A It's cold.

Q Was it cold?

A Yeah.

Q Is that a yes?

A Yes.

Q Then what happened?

A Then I looked back and he had the knife in his hands and stabbed him in the back.

Q Stabbed him where?

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A In the back.

Q Then what happened?

A He just kept stabbing him, and I walked by the tree just looking at him.

Q After he stabbed him in the back, what did Rodney Henderson do?

A Nothing.

Q What did he do? Did he just stand there, did he fall, did he look up in the air, what did he do?

A He fell.

Q Did he say anything?

A He was like, all right, man, quit, whatever I did, I'm sorry.

Q Pardon?

A He was like, I'm sorry, I'm sorry, quit for whatever I did or something.

Q Well, what was he saying that for, what was Floyd Perkins doing?

A Stabbing him.

Q How? How was Floyd Perkins positioned?

A He was just bending over, doing like this in his chest.

Q And where was Rodney Henderson?

A On the ground.

Q On his stomach, on his side, on his back?

A On his back.

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Q And where was he getting stabbed at?

A On his chest, head.

Q And during that time, he was saying what?

A I'm sorry, I'm sorry whatever I did.

Q Was he saying it like that?

A Yes.

Q I mean, just quiet like that, I'm sorry whatever I did? Show us how he was saying it.

A He was just like, I'm sorry, man, I'm sorry, whatever I did.

Q Did he say it louder than that?

A No.

Q He was just laying there getting stabbed saying, I'm sorry, whatever I did, I'm sorry? Is that what he was doing?

A Yeah.

Q Not louder than that?

A No.

Q What were you doing?

A I was by the tree just watching.

Q Just watching?

A Yeah.

Q Is that right?

A Yes.

Q Now, you haven't been charged with anything have you?

* * *

[Page 106]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Darmarr Jones}

A Yeah.

Q You mean that's karate like and stuff?

A Yeah.

Q Did you say anything to Chauncy about what you had just seen?

A No.

Q Pardon?

A No.

Q Did anybody go in the bathroom?

A Yes.

Q Who?

A Floyd.

Q Pardon?

A Floyd.

Q Did you go in the bathroom?

A No.

Q What did Floyd do in the bathroom; do you know?

A Wash his hands.

Q Did you go in the bathroom and wash your hands?

A No.

Q You're sure about that?

A Yeah.

Q Did you leave a coat over there at Chauncy Vaughn's?

A No.

Q There was a coat that you had, a checked, plaid-type of

[Page 107]

coat; wasn't there?

A Yes.

Q And it had blood on it; didn't it?

A Yes.

Q And it was Rodney Henderson's blood; wasn't it?

A Yes.

Q Now, did you hear Floyd say anything when he was over to Chauncy Vaughn's home?

A No, give me a coat or something.

Q Pardon?

A He said, give me a coat.

Q How long did you stay there at Chauncy Vaughn's home?

A About 10 minutes.

Q Then where did you go?

A I went back on Marja street.

Q Did you leave Chauncy Vaughn's home alone or with somebody else?

A With Floyd, but he didn't go on Marja, he went home.

Q And you went back on Marja?

A Yes.

Q What kind of shoes were you wearing?

A Some Vangraft.

Q Orange?

A Yes.

Q What happened to those shoes?

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A Somebody took them.

Q Where did they take them at?

A On Marja.

Q Now, did you ever call the police yourself? Did you ever call the police?

A Yes.

Q When?

A On a Monday.

Q Let me show you your testimony. You've testified before; haven't you?

A Yes.

Q Page 24, read that just to yourself. I'm talking about before Rodney Henderson's body was found. Did you read it?

A Yes.

Q Now, before Rodney Henderson's body was found, did you ever call the police?

A. No.

Q Why not?

A I didn't want to get in it.

Q Pardon?

A I didn't want to be in it.

Q Be in what?

A The situation.

Q Were you afraid you were going to get in trouble?

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A Yeah.

Q As a matter of fact, you didn't call the police until you heard that they were looking for you; did you?

A Yes.

Q And you were told that they were looking for you, and then you went ahead and called them; didn't you?

A Yes.

Q And that was on a Monday; wasn't it?

A Yes.

Q You correct me if I'm wrong, you never, up until the time you talked to the police, told anybody, any of your friends or anybody, what had happened on the Dukette Trail behind that school; did you? You never told anybody; did you?

A No, Sergeant King that Monday.

Q Other than the police, you never told Torreano Player or Marvin Mays or Chauncy Vaughn, you never told anybody; did you?

A No.

Q You told the police, and you correct me if I'm wrong, that the blood on that plaid jacket was Rodney Henderson's but that it had gotten on the jacket because of a nose bleed that Rodney Henderson had when he was wearing the jacket?

A Yes.

* * *

[Page 113]
{Q = Cross-examination by Mr. Hayman}
{A = People's witness Darmarr Jones}

Q Now, you were at this house on Marja Street; is that correct?

A Yes.

Q How is it that you got over there?

A Walked.

Q Who was with you, if anybody?

A Tye.

Q Who now?

A Tye.

Q What's Tye's real name?

A I don't know. I just call him Tye.

Q Do you know his real name?

A No.

Q Have you ever heard the name Tyresei would that be the same person?

A I don't know.

Q Did you give Tye a pair of pants to put in the cleaners for you after this incident?

A No.

Q You didn't give him a pair of pants to put in the cleaners for you?

A No.

Q Now, you were at the house on Marja street, and was there any drinking going on?

A Yes.

* * *

[Page 131]
{Q = Cross-examination by Mr. Hayman}
{A = People's witness Darmarr Jones}

A Yeah.

Q And when you left to go to J & P, your girlfriend was at the Marja street address; is that correct?

A Yes.

Q You said at that time you lost your shoes or they were taken. They were gone missing the next day; is that correct?

A Yes.

Q And these would have been the shoes that you wore on the trial through Dukette; is that correct?

A Yes.

Q Did you lose anything else besides your shoes?

A No.

Q What kind of pants were you wearing on this night?

A Some orange Damage.

Q Do you have those?

A The police got them.

Q How did the police get them?

A They told me to get them, get the clothes that I was wearing that day.

Q Where did you get the orange Damage pants from?

A Out of my room.

Q Was there anything on them?

A No.

Q And these are the pants that would have matched the

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff,

v

FILE NO. 93-48430-FC
Judge Donald R. Freeman

FLOYD PERKINS,
Defendant.

_____/

JURY TRIAL
BEFORE THE HONORABLE DONALD R.
FREEMAN, CIRCUIT JUDGE
FLINT, MICHIGAN –
WEDNESDAY – AUGUST 11, 1993

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CERTIFIED COURT RECORDER

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[Page 5]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Torriano Player}

THE JURY: No.

THE COURT: They can't hear you, speak louder.

MR. STAMOS: I think just by--he does have to speak louder. By his very nature he speaks low, so--

THE COURT: All right. Well, we want everybody to hear him.

THE WITNESS: I was over my grandmother house and Floyd called me and he was like, he was like Rodney gots to go. And I was like why, he was like I can't tell you why.

Q (By Mr. Stamos, continuing:) Was there something--was there something about cars that had been stolen or something like that that you knew about?

A (No response.)

Q Tell the jury about that.

A Somethin' about the cars?

Q The cars--was not Rodney Henderson found in a car?

A Yeah, he got found in a stolen car.

Q Okay. And you were there when it happened, where you not, or you became aware of it?

A I wasn't there.

Q Okay. But you became aware of it?

A Yeah.

Q And did Floyd Perkins then feel that--feel a certain way about Rodney Henderson in terms of that stolen car

* * *

[Page 7]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Torriano Player}

MR. HAYMAN: Your Honor, I think I'd rather--

THE WITNESS: He thought he was just a snitch.

THE COURT: Hold on just a minute.

MR. HAYMAN: I would rather the Prosecutor just asked him a direct question as to what Rodney said--I mean, Floyd said or was told--

MR. STAMOS: That's what I just asked him.

THE COURT: All right. I think he did. Why don't we get an answer.

THE WITNESS: He said that Rodney was snitch and that he needed to go.

Q (By Mr. Stamos, continuing:) Okay. But what did he think he was a snitch on? It didn't have just to do with the stolen car, did it?

A (No response.)

Q Did it have something to do with more than a stolen car?

A Not that I know of.

Q Did he tell--

A He just said that he was--since he snitched on me about the stolen car that he needed to go.

Q Let me--was there a person by the name of Tyree that was brought up by Floyd Perkins?

A When?

Q When he was talking about Rodney being a snitch?

MR. HAYMAN: Your Honor, I can't hear the witness's

[Page 8]

response.

THE COURT: I'm having difficulty, too. Speak firmly, sir.

THE WITNESS: No, there was no name of Tyree.

Q (By Mr. Stamos, continuing:) Okay. Now, what did you--did you say anything to Floyd when he told you this, about Rodney?

A I asked him why; I said don't do it. Then he said he need--he said--I said--I asked him why and he said I can't tell you why. I said man, don't do it.

Q Did you think--did you tell Rodney Henderson about what Floyd had said?

A I didn't take it seriously.

Q Now, did Floyd Perkins mention anybody else other than Rodney Henderson when he talking about somebody had to die?

A Gabriel Parker.

Q Okay. And do you know Gabriel Parker?

A Yes.

Q Now, there came a time after this occasion that Rodney Henderson came up missing, didn't there?

A Yes.

Q And Chauncey Vaughn, did he call you and talk to you about it?

A He called me and he told me to meet him on the bus.

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Q Okay. And had you been looking for Rodney during that time?

A No, I had just got home.

Q Okay. No, I mean up till the time--had you heard that Rodney was missing before Chauncey called you and--

A No.

Q --talked to you on the bus?

A No.

Q Did you meet with Chauncey Vaughn on the bus?

A Yes.

Q And he told you some things, didn't he?

A Yes.

Q And as a result of what Chauncey Vaughn told you, could you tell us what you did?

A Well, after Chauncey told me, we had went--I had--we had caught the bus up to the apartments and we had went over one of my ex-girlfriend house. And so I told them I was fittin' to go look for the body, which I couldn't find.

THE COURT: Can the jury hear the witness now, all of you? Okay, fine.

Q (By Mr. Stamos, continuing:) Could you tell the jury where you went to look for the body?

A Behind--is it Oakview? Behind--where the apartments were that the body was laying at.

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Q Is that what Chauncey had told you?

A He told--he didn't know where it was at; he just said they said it was behind there in some woods, and so ...

Q Were you able to find the body?

A No.

Q Now did there come a time when you talked to Floyd Perkins about that?

A That was the next day, that was after I had went back up there again.

Q Back up where?

A Back up there to look for Rodney.

Q Okay. And what did you say to Perkins and what did he say to you?

A Well, he asked me did I call Waddell; I said yeah. He said why. I told him that I didn't want Rodney's body just laying out there in the snow. And so he said I understand that; and I told him that I wasn't gonna snitch on him. He said I know you're not. So I asked him where was the body at and he told me.

And so that's when I said that somebody said they had seen Rodney the next day. And then he said it couldn't be, there was no way possible.

Q Okay. Why did you tell him that?

A 'Cause I had heard that.

Q Did he tell you anything else? Did Floyd Perkins tell

[Page 11]

you anything else on that occasion?

A (No response.)

Q Did he know--did Floyd Perkins know how you felt about Rodney Henderson?

A He said if things would have happened like--if he say--he said if things would have turned out like this I wouldn't have never did it.

Q What did he mean? Did you know what he mean by if things would have turned out like this he would have never did it?

A If things would have came between our so-called relationship he wouldn't have never killed Rodney.

Q If things would have--in other words, he was talking about you and him, the relationship between you and him?

A Yeah.

Q How were you feeling about this?

A I was hurt.

Q You what?

A I was hurt.

Q Now, Waddell Adams, tell the jury who Waddell Adams is and what Perkins meant by asking you whether you were the one that called Waddell.

A Waddell Adams is Rodney uncle. He used to stay with Waddell. I called Waddell and I asked him have you seen Rodney and he said no. And that's when I told him I

* * *

[Page 14]
{Q = Direct examination by Mr. Stamos}
{A = People's witness Torriano Player}

A Yes.

Q Did he ask you to go with him or do anything with him or anything of that nature?

A He asked me to come and spend the night over there.

Q Over where?

A Over to his house on Morengo.

Q And did you do that?

A No.

Q Did he ask you how you felt about him?

A He asked me was things still the same; I told him yeah.

Q Pardon?

THE COURT: Can you all hear? They're having difficulty again hearing you so speak up.

Q (By Mr. Stamos, continuing:) He asked you if things were still the same?

A He asked me if things was still the same. I told him yeah.

Q Were they?

A Nope.

Q After this conversation that you had in person with Floyd Perkins did there come a time when you called him and asked him to do something?

A Well, I had heard that he was gonna turn himself in. I called him, I asked him why was he gonna do that. He said to make things better and he hung up the phone.

* * *

[Page 27]
{Q = Cross-examination by Mr. Hayman}
{A = People's witness Torriano Player}

Q Okay. To your knowledge was there any problems between Floyd and Rodney that you were aware of?

A (No response.)

Q Had there been anything that Floyd and Rodney either fought or argued about that you were aware of?

A No.

Q And this snitching that Rodney was supposed to do didn't include Floyd, did it?

A No.

Q Okay. But it included you?

A Yes.

Q It included Demar Jones?

A Yes--well, it didn't include Demar 'cause Demar didn't have nothin' to do with it, he was just riding in the car.

Q He was riding in the car with Rodney?

A He was riding in the car with me, too.

Q Okay. Were you at the scene where this incident was supposed to have happened?

A No. What incident?

A The--involving the stolen car?

A Yeah, I was there.

Q So you were there, right?

A Yeah.

Q But you were in a different car?

* * *

[Page 62]
{Q = Direct examination by Mr. Hayman}
{A = Defendant's witness Floyd Perkins}

6:30, 7:00.

Q Okay. Is this in the morning or in the evening?

A No, this was afternoon.

Q Okay. When you arrived at Chauncey's house who was there?

A Chauncey Vaughn, Rodney Henderson, and two females.

Q Do you know the who the two females, what their names are?

A No, I don't.

Q Had you ever met them before?

A No, I hadn't.

Q Okay. What happened once you got to Chauncey's house?

A While at Chauncey's house we stayed there till about maybe 7:30. We set around talking on the telephone, laughing, joking; that was basically what we all did.

Q Okay. Did you leave from Chauncey Vaughn's home to go somewhere else?

A Yes, we did.

Q Okay. When you say we, who left?

A Me, Chauncey Vaughn, and Rodney Henderson.

Q And where did you go?

A We then went on Marja.

Q Was there any problem between you and Rodney Henderson when you saw him at Chauncey's house?

A No, there wasn't.

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Q Had you and him been in any argument or any dispute at any time prior to this day?

A No, we hadn't.

Q How did you get to the house on Marja Street?

A We walked.

Q Okay. And when you say we who all walked?

A Me, Chauncey Vaughn, and Rodney Henderson.

Q Approximately how long did it take you to get from Chauncey's house to the house over on Marja?

A It takes about--no longer than five minutes.

Q Okay. Now, when you arrived at the house on Marja Street what was going on?

A They was sittin' around in the basement listening to music, drinkin' beer, smokin' marijuana.

Q And tell me--tell us who some of the people were that were at the house on Marja Street.

A Anika Terrill; Keisha Terrill; Tyree Younger; Demar Jones; Levar Lewis; Nana, I don't know her last name; and that's basically about it.

Q Okay. Now, do you know about what time you would have arrived at this house on Marja Street with Chauncey Vaughn and Rodney Henderson?

A I'd say we got there a little after 7:30.

Q Okay. Did you have anything to drink while you were there?

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A No.

Q Okay. What did you do while you were there?

A Basically I sit and played tapes and conversate.

Q Okay. Did there come a time where you made a remark to Rodney or anyone at the house that you were going to kill Rodney or do Rodney?

A Yes, I did.

Q Tell us about that.

A Me and Rodney was sitting' on the bar--it's a bar in the basement--playing tapes. And me and Rodney was

jokin' around like we always do and he made a comment, he asked me, he said what would you do then. And I said ha-ha, I'd have to do you in. And he laughed and I laughed and that was it.

Q Okay. Were there any people that were around that heard this statement by you?

A Yes, they did.

Q Who?

A It was Demar Jones, Tyree Younger, Anika Terrill, Keisha Terrill, Levar Lewis; basically everybody that was in the house.

Q Okay. Now, when you say that Rodney had made a statement about what would you do then, what was this statement concerning, what did he mean by that?

A It was concerning a joke, cause I was doing somethin'

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and--

Q What were you doing?

A I believe I was playing a certain tape. It was a particular tape that I liked and he took it out and he said somethin' like well, what if I threw it away. And I mean, he was--he said this jokingly with me. And that was basically it.

Q Okay. Now, did there come a time when you went up to Chauncey Vaughn's--or went into a bedroom where

Chauncey Vaughn was at? You heard his testimony concerning that, did you not?

A Yes, I did.

Q Okay. Did you ever go into a bedroom where Chauncey Vaughn was at and tell him that you were going to kill Rodney?

A No, I didn't, we stayed in the basement.

Q Did you ever go--were you ever in a bedroom with Chauncey Vaughn and--I believe he said Demar--Demond, I believe, he said was in the room with him? Were you ever in a room, in a bedroom with Chauncey Vaughn where there was a discussion about Rodney?

A No, we stayed in the basement. And there was two rooms, two big rooms; there's no bedroom in the basement.

Q Okay. What happened then after--let's say after you were playing tapes, did there come a time where you left

[Page 66]

that house?

A Yes, we did.

Q Do you know about what time that would have been?

A It was 8:30, to be exact.

Q Okay. Why 8:30?

A It was 8:30 because the fact that I had to be home at 10:30.

Q Now, at 8:30 where did you decide to go?

A I had decided to go on Alma.

Q Okay. Was there any, other reason why you left at 8:30?

A No.

Q Okay. When you left tell us what happened?

A Well, before I left Rodney had already planned to leave with me, he was going on Moore Street, over his girlfriend's house. And so everybody else was sittin' there with they girlfriends so me and Rodney was the only two, basically, there that wasn't sittin' with females and he had already planned to leave. And so me and him left together at that time.

We walked out of that house--we walked out of the door, into the yard, stepped into the street. The door opened, Demar came out the house. At that time Demar said I'm fixin' to walk to the store since yo'all going that way. And we said okay, fine. We walked down--

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Q And had you asked Demar to come with you?

A No, we didn't.

Q Okay. So tell us what happens now.

A Now we walked around down Pierson Road, we went to--we came to Mike's Store first. We went in the store and I was fixin' to buy this wine for Demar and I couldn't buy it so we walked down to Pierson and Depont where there's another store, J & P. And at that store Rodney called his girlfriend to let her know that he was still on his way over there. I went in the store, Demar came in the store.

Q Okay. Tell us what happened then.

A I walked to the cooler, I bought the wine.

Q What kind of wine did you buy?

A I bought a fifth of Thunderbird.

Q Okay. Is that a wine or a liquor?

A No, it's a wine.

Q Okay. What happens next?

A After that I paid for it. Demar was standing by the door, I walked over to the door, I handed it to Demar. Demar walked out the store and I remembered the cigarettes so I turned around, I grabbed a bag of chips, I got in line, got to the front of the line, I got a pack of cigarettes. I paid for them.

Q And what happened then?

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A After that I walked out the store and Demar and them was gone.

Q And when you say Demar and them, who are you talking about?

A Demar and Rodney.

Q Okay. Did you try to find them?

A No, 'cause Demar said that he was already--after going to the store he was going make on Marja and Rodney had already planned to go over on Moore, over his girlfriend's house.

Q Now, this money that you used to buy this Thunderbird wine with, was that your own money?

A Yes, it was.

Q Okay. Were you buying--why were you buying this Thunderbird wine for Demar?

A I just bought it 'cause he asked.

Q Was it your intent to drink any of this wine?

A No, it wasn't.

Q What did you intent to do with it after you bought it?

A It was bought for him. He asked me to buy it for him, I had no problem with that, I had the money, I said fine. I bought it for him.

Q Okay. Now, you said you handed the wine to Demar. Was he inside the store or outside?

A He was inside the store.

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Q Okay. Then okay, you step outside and what happens?

A Well, when I stepped outside they were gone.

Q What did you do then?

A What did I do then? I started to walk towards the corner of Pierson Road and Dupont. And at that point a friend. Peter Junior called my name. He said Floyd; I turned around, I looked, and it was Peter. We stopped, we talked for a second. He asked me what I was gettin' ready to do. I said I'm fixin' to go on Alma. He said well, I'll stroll with you; I said fine, no problem. We started down Dupont Street to Alma.

A Okay. So you went down Dupont to Alma?

A Yes, we did.

Q And where did you go?

A We down Dupont, straight down Dupont to Alma, to the corner of Alma and Dupont and we made a right.

Q And where did you go then?

A We went to Denise Hunter's sister's house.

Q And where does she live?

A She stays one house from the corner of Dupont and Alma

Q And what's her name, do you know?

A Which one?

Q Denise's sister?

A Gale Cooper, if I'm not mistaken.

Q Okay. Did you visit with someone at this house?

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A Excuse me?

Q Did you visit with someone at this house?

A Yes, we did.

Q Okay. Who was there?

A Denise Hunter was there.

Q Okay. Now, is Denise Hunter someone you know?

A Yes, it is.

Q How do you know Denise Hunter?

A I know Denise Hunter from-- since about the eighth grade.

Q Okay. And is there any relationship between you and Denise Hunter?

A Yes, it was.

Q What is that relationship?

A She was my girlfriend at that time.

Q How long had you been dating Denise Hunter?

A Since about--I'd say since about--since she was in the tenth grade.

Q So how many years would you say you had been dating her leading up to March 4th of 1993?

A I'd say about four or five.

Q Four or five years?

A Yes.

Q Okay. What time do you think you would have arrived at Denise Hunter's house?

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A We arrived at Denise Hunter's house at nine--after nine-twenty.

Q A little when now?

A A little after nine-twenty.

Q Okay. And how long did you stay there?

A We stayed there till about twelve--or ten minutes to 10:30.

Q Okay. Was Peter still with you at this time?

A Yes, he was.

Q Okay. What happened then?

A At that time she reminded me of the time, that I had to be home at 10:30. So at that time we got over we got ready to leave. And at that point she asked me wasn't it cold outside and I said yeah, it is pretty cold. She gave me another jacket to put on. I put a jacket over the jacket that I had on and we left.

Q Okay. And where did you go?

A After that we turned around, we walked right back down Dupont Street.

Q Okay. And what happened?

A Peter left me at the corner of Matt and Dupont and that's when I turned--he kept down Dupont and I turned on Mott.

Q Okay. You turned on Mott Street?

A Yes, I did.

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Q Okay. Now tell us what happened then.

A I walked past Edwards; the next block was Baldwin. At that point I seen Demar Jones.

Q Okay. You saw Demar Jones?

A Yes, I did.

Q And where was Demar Jones going or where did it appear he was going?

A He wasn't really on his way nowhere, he was at the corner of Baldwin and Mott.

Q Okay. So what happens after you see Demar Jones?

A After I seen Demar, he was standing under a street light. That's when I first caught up with him and I noticed he had blood on his pants, his shoes, his coat; and he had a pair of black leather gloves on.

Q Okay. Did you ask him about that?

A I asked him what happened.

Q What did he tell you, if anything?

A He said I got in a fight and he mumbled something. Then he started to cuss me out.

Q Started to cuss you out?

A Yes.

Q Do you know what he was cussing you out about?

A No, at the point in time Demar, he was--I wouldn't say drunk, but I'd say pretty close to it.

Q Okay. So what happens next?

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A At that time I asked him was he all right, he said yeah; he continued to cuss so I turned and I walked from him. And I went down to Chauncey's house.

Q So tell us what happens then.

A I went to Chauncey's house. My purpose of going to Chauncey's house was to return the watch that I borrowed from him earlier that day. I went to Chauncey's house, I walked in, I handed Chauncey his watch. Chauncey was mopping the floor and talking on the phone to his girlfriend.

At that time I walked in the bathroom, I washed my hands. I came back out into the kitchen area. Demar was down in the basement. I opened the refrigerator to see what was in there to eat. Chauncey got off the phone. I think I grabbed maybe something to eat out the refrigerator. Then we got ready to leave--well I got ready to leave. And Demar came up out the basement. At that point in time Demar didn't have on the same coat that he had on when we got there.

Q Okay. What was he wearing then?

A Demar then had on a blue and white Georgetown jacket, a Starter coat,

Q Okay, Now, when you saw him first under the street light what type of jacket did you observe him to be wearing at that time?

[Page 74]

A Demar had on a plaidy--plaid like tannish colored, somewhat about this color.

Q Okay.

A With lines in it and a hood.

Q And did you go down in the basement where he was at?

A No, I didn't.

Q So you never went down in the basement yourself; is that correct?

A No, I didn't.

Q So at some point you decided to leave; is that correct?

A Yes, that is.

Q And where did you go?

A At that point I left and I went back on Baldwin to Baldwin and Mott; I went down Mott Street and I got ready to go home on Susan and I felt in my pockets for my keys and my keys weren't in there and my driver's license wasn't in there.

Q Okay. So what happened?

A At that point I went up Marja and I found--me and Demar went up Marja and he was already going on Marja 'cause that's where he was staying the night. I went on Marja, my keys and my driver's license was laying in front of the house by the driveway area.

Q Okay. So you--

A Demar went in the house; I picked up my driver's license

[Page 75]

and my keys.

Q Okay. So you sent back to the Marja Street address with Demar; is that correct?

A Yes, I did.

Q And you found your keys and your license in the front yard of this residence?

A Yes, I did.

Q Okay. What did you do after you found them?

A After that I talked with Tyree briefly for a second and then me and Chauncey's brother--Chauncey's brother was on his way home--he went back down Mott and I turned right at the corner and went home on Susan.

Q Okay. You went home?

A Yes, I did.

Q Okay. Did you stay home--at the address on Susan?

A Yes, I did.

Q Okay. Now, did there come a time after this date where you called Torriano Player?

A No, I didn't; I never called him.

Q Did you ever call Chauncey Vaughn?

A Yes, I did.

Q Okay. Let's talk about that. When was the first time you called Chauncey Vaughn?

A The first time I called Chauncey Vaughn would have been Thursday night.

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Q Okay. And why did you call him?

A I called Chauncey and I asked him, I said did Demar tell you what happened, 'cause him and Demar had been in the basement together. I figured maybe Demar told him what--who he got in a fight with or whatever.

Q And what did Chauncey--I don't know what he told you, but what else did you say to Chauncey?

A That was basically about it.

Q Did Chauncey tell you anything--I don't want to know what he said, but did he tell you anything about Demar?

A Yes, he did.

Q Okay. Did you have another occasion to call Chauncey Vaughn?

A Yes, I did.

Q Okay. When would that have been?

A I called Chauncey Vaughn about Saturday.

Q Okay. And what were you calling him for on Saturday? What was the reason for calling?

A It was no particular reason, I just called.

Q Did you normally give Chauncey a call or--I mean, were you in the normal habit of calling Chauncey Vaughn?

A Yes, I was.

Q Did you consider him a friend of yours at this time?

A Yes, I did.

Q Had anything happened between you and Rodney Henderson on

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this date that would have caused you to be angry with him?

A No. Me and Rodney never had a argument, we never had a fall out--only thing me and Rodney did was drink beer together, talk to girls, that was it.

Q Now, do you recall a time where there was some discussion, either by Torriano Player or Chauncey Vaughn about Rodney possibly snitching on them or saying--giving some information on them? Do you know anything about that?

A Yes, I do.

Q Would you tell the jury what you know about it?

A On that particular occasion it was Chauncey's birthday, we were on Susan Street at that time. It was me, Chauncey, Marvin, Torriano, Rodney, and about maybe two other people.

At that point in time they was drinking and everything and Torriano pulled me off to the side and he pulled Rodney off to the side. And at that point in time Torriano informed me that Rodney was a snitch because of some cars and some other activity which I had no knowledge of.

Q Okay. Did Torriano appear to be angry to you?

A No, he didn't.

Q Did he and Rodney argue about that?

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A No, they didn't argue about that. In fact, Rodney didn't say anything about that.

Q Okay. Now, are you aware if there was a fight between Torriano and Rodney within a few days of this incident on March 4th of '93?

A It was a week before that.

Q Would you tell the jury what you--were you there?

A Yes, I was.

Q Would you tell the jury what it is that you observed?

A Well, I was standin' in the house and--

Q Whose house?

A I was standing in--we were on Marengo at that time.

Q Okay. Who would have been living on Marengo?

A Denise Hunter.

Q Okay. That's your girlfriend?

A Yes, it was.

Q Is that her home?

A Yes, it is.

Q Okay. Tell us what happened.

A Well, me, Chauncey Vaughn, we were in the house; Rodney Henderson, Torriano, and a guy named George, they were outside gettin' ready--we was all gettin' ready to leave and go back on Susan over to my house.

At that point in time Rodney came in the house and he had blood runnin' from right here. And I asked him

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what happened and he said Torry had hit him. And George came--

MR. STAMOS: I'm going to object, that's hearsay.

THE COURT: Yes, let's remove the hearsay.

Q (By Mr. Hayman, continuing:) Did you actually see them fight?

A No, I didn't; I only seen the end result.

Q Okay. Did you say anything to Torriano or to Rodney about--did you say anything to Torriano about what you saw?

A No, I didn't. You referring to when Rodney came back in the house?

Q Yes. Did you tell--ask Torriano about that?

A No, I didn't.

Q Did you guys get in a car at some point and leave together?

A Yes, we did.

Q Now, you heard testimony from Torriano about you telling him that you were going to do Rodney or you were going to kill Rodney. Did that happen?

A No, it didn't; I never told him that.

Q Did you call Torriano and talk to him on the phone any time after March 4th of '93?

A No, I didn't. After March 4th, the only time I spoke with Torriano is when he called my house.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN, *
*
vs. * NO: 93-48430-FC
*
FLOYD GENE. PERKINS,* JUDGE FREEMAN
*
Defendant. *
*

* * * * * * * * * * * * * * * * *

VOLUME V

Transcript of proceedings had in the above-entitled cause before the HONORABLE DONALD R. FREEMAN, Circuit Judge, on August 12, 1993, at Flint, Michigan.

APPEARANCES:

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* * *

[Page 14]
{Q = Direct Examination by Mr. Hayman}
{A = Defendant's Witness Peter Junior}

MR. HAYMAN: I would like the record to reflect that he's identifying Mr. Perkins.

THE COURT: Yes.

Q (By Mr. Hayman, continuing:) Mr. Junior, do you recall what you were doing on March 4th, 1993, sometime in the evening hours?

A No.

Q Okay. Do you recall ever seeing Floyd Perkins on March 4th, '93?

A Yes; I seen--I don't know if that was the date or not.

Q You don't know if that was the date?

A Yeah.

Q Tell us what you recall.

A I remember seeing Floyd walking across Dupont and Pierson Road. I was standing at the store.

Q What store were you standing at?

A At J & P.

Q And where is J & P located?

A On the corner of Pierson and Dupont.

Q Do you have any idea about what time this mayor may not have been?

A It had to be around--around 9:00,--

Q Okay.

A --9:30; something like that.

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Q Was anyone with Floyd Perkins at that time?

A No. There was no one with him when I seen him.

Q Tell us what happened.

A He just told me he was going down to his girlfriend's house where his sister's girlfriend house--where his girlfriend's sister's house, so he asked me to walk with him. We were walking down there and we was talking about females. Then we go and went down and played the video games for awhile.

Q You went down where?

A Down on Alma Street.

Q Do you know the address on Alma?

A Ugh-uh.

Q Do you know an approximate location on Alma?

A It's about two houses off the corner.

Q Corner of what?

A Dupont.

Q So two houses off the corner of Dupont and Alma?

A Yes.

Q Do you recall whose house it was exactly; the name of the person?

A Ugh-uh.

Q Yes or no?

A No.

Q You have to say yes or no because this is being

[Page 16]

recorded; and ugh-uh, we don't really know if that's a yes or no.

A No.

Q Okay. Do you know approximately what time you would have arrived at this time on Alma and Dupont?

A About--Not the exact time, no.

Q Tell us what happened once you got there.

A We just sat around, talked, played the video games.

Q Do you know who was at this house at the time you arrived there?

A No one but Denise.

Q No one but Denise?

A Yeah.

Q Who was Denise?

A Floyd's girlfriend.

Q Okay. And you say that you were playing, playing what?

A Nintendo.

Q Okay. Who were you playing Nintendo with?

A Me and Floyd played.

Q Okay. How long did you stay there?

A I don't know. About hour and-a-half, an hour. I don't know. We didn't stay too long because I can't get in after 11:00 o'clock at my girl house.

Q Where does your girl live?

A On Marengo.

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Q Tell us what happened. First of all, did you leave the house on Alma and Dupont?

A Yes.

Q Who left with you, if anybody?

A Me and Floyd left the house.

Q Okay. Was there anyone else with you and Floyd?

A No.

Q Where did you go?

A I went back to Marengo. I don't know where Floyd went.

Q Tell us the direction that you took.

A I went straight down Dupont.

Q Which direction did Floyd take, if you know?

A He went back up toward the store.

Q Did he also go along Dupont with you?

A I don't know where he went. I just kept--I kept straight.

Q Okay. Did both of you go down Dupont at least for a ways?

A Yeah; we both walked down Dupont.

Q Do you know where you left Floyd at on Dupont?

A Up by the store.

Q Up by what store?

A J & P

Q Okay. And which direction did you take then?

A I went straight on Dupont.

* * *

[Page 31]
{Q = Direct Examination by Mr. Hayman}
{A = Defendant's Witness Denise Hunter}

A Right there. (Indicating.)

MR. HAYMAN: I would like the record to reflect she has identified Floyd Perkins.

THE COURT: Yes.

Q (By Mr. Hayman, continuing:) Ms. Hunter, how is it that you know Floyd Perkins?

A That's my boyfriend.

Q He's your boyfriend?

A Yes.

Q And how long has he been your boyfriend?

A Since '87.

Q Since 1987?

A 1987.

Q Where do you reside as of today?

A On 301 East Marengo.

Q Could you tell us how long you have been living at that address?

A I've been--That's the only place I have been staying. About 20 years.

Q You've been living there about 20 years?

A Yes.

Q Were you living at the address on Marengo around March,early March of 1993?

A Yes.

Q Do you recall an occasion--I would like to take you

[Page 32]

to March 4th of '93, if you recall. Do you recall that Floyd Perkins came to your home on that day?

A Yes.

Q Was he living there at the time?

A Living where?

Q At your--Well, let me ask you this. You say he came to your home. Did he come to your home on Marengo?

A He came over to my sister's house.

Q Was Floyd Perkins living with you at this time?

A No.

Q What is your sister's name?

A Gail Cooper.

Q Where does Ms. Cooper live?

A 641 West Alma.

Q Could you tell us how--where that address is in relation, say, to Dupont Street?

A It's right--It's the corner house. It's right on the corner of Alma and Dupont Street, first house.

Q Do you have any idea as to the approximate time Mr. Perkins would have come to that address?

A It was around 9:20, somewhere around there.

Q Is there any reason why you recall that on this particular day it was around that particular time?

A Because the stove and the refrigerator has a clock on it. And I was in the living room when they got to the

[Page 33]

door. We always look at the clock. When we either answer the phone or the door, we look at the clock.

Q Okay. When Mr. Perkins came, was there anyone with him?

A Yes.

Q Do you know who his friend is?

A Peter.

Q What did they do while they were at your sister's home with you?

A Played the Nintendo game.

Q Who all was at the house during this time?

A Me, Floyd, and Peter.

Q Anyone else?

A No.

Q Why were you at your sister's house on this particular day?

A Because I went over there after I got home from getting my hair done. I just went over my sister's house. I didn't go home; I just went over there.

Q How did you gain access to her house if she wasn't there?

A I have a key.

Q Do you know--First of all, did Floyd Perkins leave your sister's home at some point?

A Yeah. He left around--little after 10:15.

* * *

[Page 39]
{Q = Direct Examination by Mr. Hayman;
Q = Cross-examination by Mr. Stamos}
{A = Defendant's witness Denise Hunter}

Q What kind of car was Marvin driving?

A It was white. I don't know what kind of car it is.

Q Is the testimony you've given here concerning Johnny Player coming to your house and Marvin Mays coming to your house, have you ever been questioned about that by either me or the police?

A No.

Q Is this the first time that these questions have been put to you?

A Yes.

MR. HAYMAN: Okay. I have no other questions, your Honor.

THE COURT: Okay. Cross-Examination.

CROSS-EXAMINATION

BY MR. STAMOS:

Q The police didn't even know about you until yesterday, did they?

A I don't know.

Q Pardon?

A I don't know.

Q I mean, you came to court yesterday, you never talked to the police, you never went to the police station or anything; did you?

A No, I--

Q The question was, you didn't.

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A No, I didn't.

Q Okay.

A No.

Q And Sergeant King just got an opportunity to talk to you out here in the hallway yesterday; right?

A Right.

Q Now, you've been Floyd Perkins' girlfriend, as you described it; right?

A Yes.

Q Since 1987?

A Yes.

Q And how close of a relationship?

A We're close.

Q Do you have children together?

A Yes, we do.

Q How many?

A One.

Q You're still close; are you not?

A Yes.

Q You had lived together; had you not?

A Yes.

Q And what address did you live together at?

A 301 East Marengo.

Q And you--Correct me if I'm wrong, you would like to continue living with Floyd Perkins; wouldn't you?

* * *

[Page 51]
{Mr. Stamos's summation}

that. And this man right here talked about killing a certain person. And he talked about killing not only Rodney Henderson but he had also mentioned that he was going to kill Gabriel Parker. We didn't get into that much because that's not relevant to this case, but it was testified to.

He not only would say that, but he would tell, as Marvin Mays testified, that if he were to kill somebody, he would stab them, but not only stab them, stab them in the head area; and that he would do it in a field and that he would torture them. And that after he would do this, that he would be able to just go home and act like nothing happened.

Now, nobody really took him serious. It's sort of like you listen and you say, well, maybe he's serious, but, no, he's not serious. And you kind of just put it out of your mind and you go ahead with life.

The only thing was is that he was serious. And that on March 4th of 1993 he again expressed what he was going to do, and then even then people didn't really take him serious until Rodney Henderson did come up missing. Because Rodney Henderson left with this man and Damarr Jones. And we'll get into Damarr Jones; I don't want you to think Damarr Jones is fooling

[Page 52]

anybody either. He just doesn't happen to be on trial here, this man's on trial. But they left together, and he had told what he was going to do. He was going to go over the cat trail. He told Damarr Jones inside the store when he was buying the wine what he was going to do; and, in fact, he did exactly what he had told people he was going to do.

He stabbed behind Dukette school Rodney Henderson in the back. And I would suggest to you that Damarr Jones stabbed Rodney Henderson in the chest. Because if you remember the autopsy report, there were injuries of stab wounds to the back that penetrated the lung, and there was a stab wound to the chest that penetrated the lung; both. And Rodney Henderson was in the middle, and I would suggest to you that both Damarr Jones and Floyd Perkins--Damarr Jones being 15 years old--stabbed him at approximately the same time when this signal was given in terms of it's cold outside. And that Rodney Henderson fell down into the snow in these woods on this trail on his back. And then he didn't let him just do that though, that he got down and carried out just how he described to Marvin Mays he would carry out a

killing; that while Rodney Henderson lay there probably bleeding to death from the puncture

* * *

[Page 67]
{Mr. Stamos's summation}

He had called the police and all that. But when asked directly by Mr. Hayman--and he didn't expect that question--he just said he would pick him up, not that he would find the body and then get ahold of the authorities and have them come out and take care of the body, or not that he would run and get Chauncey or not--there was a lot of other things he could have done, but he said, I would have picked him up. And that expresses his feeling for Rodney Henderson, which was much different than Perkins' feeling here.

And I want to let you know that Perkins is on trial in this case. But you heard the testimony from Damarr Jones. And in particular, you heard him testify that he hasn't been promised anything, no charges have been brought against him, but he hasn't been promised anything at all. And I want you to know that because nobody is sitting here telling you that Damarr Jones is totally innocent in this. I want you to know that. Nobody's foolish; all right. But in this particular trial, the issue is Perkins. Okay. So I just don't want you to get caught up in Damarr Jones right now. The evidence shows that Damarr Jones was involved; okay. But, it's Perkins right now. And it's Perkins who did the torturing just as he had told Marvin Mays he would. It's Perkins who bragged about it as he had

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FLOYD PERKINS #233916
Petitioner,

v.

G. MCQUIGGIN
Respondent
_____/

Case No. 2:08-cv-139
HON. ROBERT
HOLMES BELL

OBJECTION TO REPORT and RECOMMENDATION

Petitioner Floyd Perkins files this objection as of right, in response to the Report and Recommendation issued on September 17, 2008. In which this Honorable Court erroneously began its report and recommendation by stating "petitioner was convicted pursuant to a guilty plea of murder."

For the purposes of this objection, petitioner pled not guilty to the charge of murder and guilty to being a second habitual offender after his conviction of murder. (See T.T. Vol. 6, pg 8 & 9)

Petitioner now appeals this issued report and recommendation and asks that this Court move in petitioners favor for the granting of a certificate of appealability base on the following:

I. Petitioner Makes A Credible Claim of Actual Innocence.

II. Petitioner Has Vigorously Pursued His Actual Innocence Claim With Reasonable Diligence for Purposes of Avoiding Antiterrorism and Effective Death Penalty Ac (AEDPA) Statue of Limitations Based on Claim of Actual Innocence.

III. Petitioner Can and Does Meet the Criteria For Equitable Tolling.

IV. Petitioner Asserts That Denial of Equitable Tolling Would Violate His Fifth, Eight, and Fourteenth Amendments Rights, and 28 U.S.C. § 2244(d)(1).

I. Petitioner Makes A Credible Claim of Actual Innocence.

Petitioner makes a credible claim of actual innocence by introducing reliable new evidence (affiant Linda Fleming) not presented at trial. Especially when considered with the previous new evidence (affiant Demond Louis) (also not presented at trial) petitioner submitted within the body of his 6.500 Motion For Relief of Judgment.

Since the time of his arrest, petitioner has put forth a principal defense of actual innocence, as well as that of alibi. Which has been maintained throughout his entire criminal proceedings. And pursued on direct appeals and collateral attacks in the state courts,

arguing, inter alia, that ineffectiveness of counsel resulted in exculpatory evidence not being developed or presented to the jury. New evidence which may be considered for purposes of determining wether habeas petitioner has established actual innocence exception under Antiterrorism and Effective Death Penalty Act (AEDPA) is not limited to that unavailable at trial, but rather, includes evidence that the original fact finder did not consider then. [Habeas Corpus: Key 401; 28 U.S.C.A. § 2254] There is more than a likelyhood that a reasonable juror would not have found him guilty beond a reasonable doubt had such new evidence been presented in its entirety. [Habeas Corpus: Key 603; 28 U.S.C.A. § 2244(d)(1)].

Petitioner does not dispute that his petition was filed outside the one year limitations period, but argues that habeas relief is not foreclosed because he is actually innocent of the crime.

A de novo review of the record by this Court in light of serious claims asserted, is warranted to further prevent the continuing miscarriage of justice that has already transpired.

In the instant case, petitioner put forth an alibi defense and a defense of actual innocence, and that the states sole eye-witness was the actual murder and that petitioner was being set up to be the fall guy. Petitioner also took the stand on his own behalf and testified to the fact that he had been with the state's eye-witness and victim before the crime occurred. Petitioner continued his testimony stating that later that eveing he again saw the state's eye-witness intoxicated and covered in blood from head to toe, and heard that the victim was dead shortly after. (See T.T.

Vol. 4, pg. 66-72). However, up until the finding of the two affiants years later, petitioner's testimony was uncorroborated in this regards. Petitioner did present an inkling of insight into his line of defense at the very beginning of the courts proceedings in charging him with the crime. All be it, the information petitioner had at the time was only based on information verbally supplied to him and had not been developed into factual evidence (See affidavit of Ronda Hudson). Petitioner informed his counsel that he had been told of a possible witness who could corroborate his testimony and theory.

But, for counsel's ineffectiveness in failing to provide a minimal amount of investigation into his clients assertations, the evidence/witness was never developed, produced, or substainuated. Subsequently, by the time petitioner learned of the witness name, said witness had retired from her place of employment and could not be located by petitioner who was incarcerated.

In the continuation of proving his innocence, petitioner found the affiant Demond Louis, who, if presented at trial by effective counsel, would have put forth a strong showing of petitioners claims of innocence.

Petitioner persented this newly discovered evidence within the body of his 6.500 motion, which was denied and unheard by the courts.

As much in this case turns on wether evidence not presented to the jury is sufficiant to present a credible claim of actual innocence, a brief description of the proceedings and trial is necessarily appropriate.

There was no physical evidence linking petitioner to the murder. Instead, the prosecution sought to establish petitioner's connection to the murder through testimony. The prosecution's star withness was Damarr Jones, the only testifying eye-witness to the murder and petitioner's alleged involvement. As well as an undisputed active participant to the murder by his own admissions.

Petitioner began his defense by stating he was not present at the time the crime occured. And presented two alibi witnesses who testified to petitioner being in their pressence throughout the hours betitioner was alleged by (Jones) the state's eye-witness, to have been committing the crime. (T.T. Vol. 4, p 101-03; Vol. 5, p 13-19, 30-38) Petitoiner chiefly presented a defense that Damarr Jones was the actual murder. In this regards, petitioner points to numerous instances leading up until now. First petitioner informed ineffective counsel that (Jones) the states alleged eye-witness had been the actual killer, who petitioner believed had taken clothing he wore in the perpetration of said crime to the cleaners. Counsel showed that he had knowledge of petitioners assertations by asking pointedly if Jones had taken clothing to the cleaners. (T.T. Vol. 3, p 136)

Counsel's failure to locate and investigate did not develop the new evidence we have before your Honor now.

Through petitioners own diligence, he secures the affidavit of Ronda Hudson, stating that she was the intial person who verbally relaid the information to petitioner (the same information petitioner passed on to counsel).

Petitioner then, through his own due diligence, secures an affidavit from Demond Louis in 199 , who now officially corroborates petitioners claims and gives proof to petitioners assertations of Jones being the actual murder. Which petitioner submits to the lower courts by way of 6.500, which was not entertained by the courts.

Petitioner then, years later, secures more new evidence and submits in the form of his habeas petitioner which is now at the heart of petitioners objection of procedural bar for default.

The fact that such evidence substantuates previous newly discovered evidence and petitioner's actual innocence testimony does not make it cumulative. [Habeas Corpus; Key 603; 28 U.S.C.A. § 2254].

As the Supreme Court has stressed, "actual innocence" means factual innocence not mere legal insufficiency. Thus to succeed on this claim, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have found him guilty beond a reasonable doubt. [Lucidore, 209 F.3D at 114 (quoting Schlup, 513 U.S. at 327-28, 115 S. Ct. 851) (Bousley v. U.S., 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998).

Newly discovered evidence which would have been admissible at trial can be considered by Habeas court on an actual innocence claim. The court states in Schlup . . . [but may] consider the probative force of relevant evidence that was either excluded or unavailable at trial. Moreover, the Habeas Court must make its determination "in light of all the evidence, including . . . evidence tenably claimed to have been

wrongly excluded or to have become available only after trial. [Id. at 328, 115 S. Ct. 851 (quoting Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgements, 38 U. CHI. L. Rev. 142, 160 (1970). Emphasis added.

The present case presents simular issues as in Gomez v. Jaimet, where the court stated "evidence does not need to be newly available, just newly presented." 350 F.3d 673, 679 (2003). Also see Griffin v. Johnson, 350 F.3d 956, 963 (2003). Petitioner further suggests this courts colleagues be considered where it was stated "that such must be evidence not known at time of trial. Amrine v. Bowersox, 238 F.3d 1023, 1029 (2001).

The facts of this case, when considered with petitioners alibi evidence, argues strongly against petitioner's participation in the murder.

While all affiants would have corroborated petitioners testimony. Each of these affiants individually and independently established strong proofs of petitioners defense of actual innocence. As each affiant corroborates the previous affiant. The direct party interest of the two pieces of newly discovered evidence is non-existant, as affiant Demond Louis is brother of Chauncey Vaughn who testified against petitioner, as well as a friend of Jones, And affiant Linda Fleming knew niether petitioner, the eye-witness, or anything concerning the case.

For these reasons, petitioner has made a credible claim of actual innocence, as the evidence is "so strong that [the Court] cannot have confidence in the outcome of the trial.

As a result, assuming that an actual innocence exception to statue of limitations exists, "the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims," "And attempt to show that his trial was tainted by "non-harmless constitutional error."

* * *

II. Petitioner Has Vigorously Pursued His Actual Innocence Claim With Reasonable Diligence for Purposes of Avoiding Antiterrorism and Effective Death Penalty Act (AEDPA) Statue of Limitations Based On Claim of Actual Innocence.

Petitioner now points to Garcia v. Portuondo 334 F.Supp.2d 446, in which the Court "correctly identified the standard by which a Habeas Court should determine whether to reach the merits of a petition that otherwise would be barred because of state procedural defaults. In those situations, the actual innocence claim is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Whether the constitution requires an actual innocence exception to AEDPA's statue of limitations remains an open question by all circuits. However, petitioner would pray that this court would elect to lean towards the four prong standard associated with Whitley v. Senkowski, 317 F.3d 223, 225 (2003), which asked (1). Did petitioner pursue his actual innocence claim with reasonable diligence? (2) If petitioner did not pursue the claim with reasonable diligence, must an actual innocence claim be pursued with reasonable diligence

in order to raise the issue of whether the U.S. Constitution requires an 'actual innocence' exception to the AEDPA statue of limitations? (3) If petitioner did pursue the claim with reasonable diligence or if reasonable diligence is unnecessary, does petitioner make a credible claim of actual innocence? (4) If petitioner does make a credible claim of actual innocence, does the U.S. Constitution require an 'actual innocence' exception to the AEDPA statue of limitations on federal habeas petitions?

Petitioner herein, has shown reasonable diligence since the beginning of his criminal proceedings. Baring the ineffective assistance of trial counsel who filed motion to withdraw two weeks prior to trial and failed to inform his client, petitioner became a pro se litigant by necessity and lack of choice.

With exception to appointed appellate counsel who acted on petitioners behalf during COA and Supreme Court process; petitioner must point out the numerous hurdles of excercising his reasonable diligence.

First, petitioner's unwilling trial counsel refused to provide petitioner with any document pertaining to petitioners case and then flatly lied about such. (See exhibit 1 & 2).

Petitioner then sought pro bono help in proving his innocence on Aug 5th, 1996, by way of DNA Blood Testing. (See exhibit 3). Petitioner was then denied basic reports and records which were never provided to appellate counsel nor petitioner who made numerous request dating from 1994 to 2006. (See exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16).

In 1998 petitioner sought to have the first piece of newly discovered evidence heard by the circuit court with the filing of his motion for relief from judgement. (See exhibit 17).

And requested to amend said motion in 1999. (See exhibit 18). Petitioner's motion was not heard until two years later, (See exhibit 19), largely in part to petition's filing of motion to conduct an evidentiary hearing (colam Nobis)(colam vobis) under title 28 USC § 1654 federal rules of civil procedure 60(B). (See exhibit 20). All of which, was denied on October 25, 2000.

Petitioner then began seeking assistance to aid him in the filing of his habeas petition. (See exhibit 21, 22, 23, 24). It should be noted that one month prior (9-11-01) to petitioner's filing deadline, petitioner's legal document's and much of his personal property were destroyed by MDOC staff following petitioner's involvement of inciting a riot. After which, petitioner was denied access to the law library and law materials while he was held in solitary confinement from 9-11-01 to 5-9-06, at the St. Louis Correctional Facility and Alger Maximum Correctional Facility, along with other inmates, as this with the norm at such time. (See exhibit 25).

With the passing of petitioner's filing deadline, petitioner continued to diligently seek legal assistance. At the same time conduct a reasonable investigation into the proof's of his actual innocence, or as much as one could have done being confined to solitary.

Petitioner's efforts yielded the securing of affiant Linda Fleming's affidavits in July 2002, after numerous years of independent research. (See exhibit 26).

Petitioner then sought the assistance of fellow prisoners and jailhouse lawyers to continue the pursuit of his actual innocence. (See exhibit 27). As well as the assistance of outside legal agencies. (See exhibit 28).

Petitioner also continued to seek recourse due to counsel's ineffectiveness at trial, after trial, and regarding records (see exhibit 29).

Petitioner then sought release from solitary confinement and transfer to another facility, so that he could overcome the denial he faced of not being allowed proper legal materials or access to the Courts. Petitioner secured tranfer only to encounter continued retaliation for the 2001 riot incident, via denial of legal materials while being held in solitary confinement at Baraga Maximum Correctional Facility. (See exhibit 30, 31, 32, 33, 34, 35, 36).

At no time has petitioner abdicated his quest to prove his innocence nor the diligence with which he has been able to exhibit.

For this reason and due to the interest of justice, petitioner requests that this court allow his claims to be heard.

* * *

III. Petitioner Can and Does Meet The Criteria For Equitable Tolling.

Most courts have held that AEDPA's one year filing period is a statue of limitations subject to equitable tolling.

Petitioner herein has established that he acted with reasonable diligence during the period he seeks to toll, to the best of his ability.

While petitioner's claim of actual innocence stands on the line of the causation standard. Petitioner asks this Court to find that the statue is tolled, irrespective of causation, wherever a constitutional violation has resulted in the incarceration of one who is actually innocent.

For this reason, to ensure that federal courts were not barred from hearing a petition on procedural grounds where there had been a miscarriage of justice, the Court carved out two narrow exceptions to these procedural rules. The first exception being for "cause and prejudice," which allows review where the petitioner established cause for the procedural default and actual prejudice therefrom. This exception is simular to the requirement of a casual link between the extraordinary circumstance and the untimely filing to the toll limitations r iod.

The second exception, relevant to the case at bar chiefly, is far more narrow, and allows habeas review in cases where there has been a fundamental

miscarriage of justice and the petitioner establishes a credible claim of actual innocence.

The Supreme Court recognized this exception to allow a federal habeas court to grant the writ even in the absence of cause for procedural default. [Schlup v. Delo 513 U.S. 298, 321, 327, 115 S. Ct. 85; 130 L.Ed.2d 808 (1995)].

The court tied it to a showing of actual innocence in order to ensure that the exception is exceedingly narrow. The court tied it to cases such as the one at bar.

The manifest injustice exception is able to balence both systemic interests in finality, comity, and conversation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case.

A toll in petitioners case would be appropriate as it would not conflict with the statutory language creating the time limit. (See U.S. v. Beggerly, 524 U.S. 38, 48, 118 S. Ct. 1862; 141 L.Ed.2d 32 (1998)).

A useful starting point in the consideration as to wether the statue reasonably admits of a constrution permiting equitable tolling in the rare case of a credible claim of actual innocence is 28 U.S.C. § 2244(b)(2) which provides in part: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (B)(ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would

have found the applicant guilty of the underlying offense.

In the present case, petitioners application is niether successive or abusive. And one of the strongest pieces of evidence presented, that of an uninterested party, corroborates the first newly discovered evidence petitioner presented to the lower courts (who did not entertain) and petitioners own original testimony and version of facts, which the prosecutor would have had to disprove if not for counsel's failure and disregard for petitioner as a client. Furthermore, the new evidence of affiant Linda Fleming, was only able to be developed after the filing timetable, by petitioner, an incarcerated 8th grade dropout, filing an intial claim pro se.

It is difficult to imagine that a Congress that explicitly allowed the maintenance of a second or successive petition where the applicant makes out a strong claim of actual innocence implicitly intended to foreclose as untimely an intial petition brought by an individual with a comparable claim. This is especially so given that the restrictions on filing successive petitions in Section 2244(b) were intended to codify and tighten previously imposed limits successive and abusive petitions. Section 2244(b)(2) was based, in part, on the already existing exception for actual innocence. In contrast, AEDPA's creation of a fixed statue of limitations for federal petitions was a new addition to the legal landscape. In this context, at least two Justices of the Supreme Court have found that equitable concerns may be appropriate in filing "in a perceived omission on the part of Congress."

Petitioner would now point out that, the view that an equitable toll is appropriate where a petition makes

out a credible claim of actual innocence draws additional support from the text of the statue of limitations itself, Section 2244(d)(1). It provides that the one year limitations period begins to run on various alternative dates, among them the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. Thus, a petitioner is entitled to deferral of the running of the limitations period where the factual basis for relief unrelated to guilt or innocence justifiably is discovered belatedly. The case for relaxtion of the rigor of the statue of limitations argueably is far more compelling in the case of a petitioner who makes a credible claim of actual innocence. More so, when the Court is presented with a petitioner who immediately, upon the development of such newly discovered evidence (See exhibits 18), sought legal assistance to pursue his claims. As well, a petitioner who was forced to obtain transfer due to being denied access to the courts and had to file grievances while in solitary confinement. "Such a case deserves tolling."

Petitioner herein humbly throws himself at the mercy of your Honor, in hopes that justice may be sought and not grossly neglected.

* * *

IV. Petitioner Asserts That Denial of Equitable Tolling Would Violate His Fifth, Eight, and Fourteenth Amendments Rights, and 28 U.S.C. § 2244(d)(1).

The Supreme Court has observed that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. It has noted further that it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

Petitioner herein, now argues that his due process is protected under the Fifth Amendment's equal protection cause. And could surely be violated if the issues were not entertained.

The Fifth Amendment clearly governs actions of Congress, and it would be the state who would violate due process by the continued incarceration of an innocent petitioner. Which raises significant constitutional concerns. And is also incorporated through the Fourteenth Amendment.

Equitable tolling in petitioner's case would avoid constitutional issues that may arise by a strict application of the AEDPA statue of limitations.

Being that Congress has extended federal habeas review to state prisoners, the question of whether it may be denied on procedural grounds to a petitioner who credibly establishes actual innocence here implicates the Due Process Clause of the Fifth Amendment.

In Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, the Supreme Court indicated that innocence has a constitutional dimension, assuming but not deciding, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial

would render incarceration of defendant unconstitutional and would warrant federal habeas relief if there were no state avenue open to process such a claim."

Such is petitioners case now, where a procedural rule governing federal habeas corpus shall violate the due process clause.

In Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639 (1986), the Supreme Court recognized that, in some cases, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent," the "imperative of correcting a fundamentally unjust incarceration" would force other important habeas prinicples such as comity, federalism, and a State's interest in the finality of its criminal court judgments to yield. In response to this imperative, the Court created a "miscarriage of justice" exception to allow for review of an otherwise defaulted claim where the petitioner could establish actual innocence and a constitutional violation.

The Supreme Court consistently has reaffirmed the existence of an exception for actual innocence where a petitioner's lack of compliance with procedural requirements otherwise would bar review. The Court's creation of an exception for actual innocence in cases suggests that the incarceration of one who is innocent is so repugnant to the traditions and conscience of our people that, where the writ of habeas is provided for, it may not be denied on procedural grounds for one who is innocent.

In petitioners case, the continued imprisonment of an actually innocent person would violate just such a fundamental principle.

Wherefore, petitioner humbly requests that this court would allow and grand his submission.

No. 09-1875
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 24, 2010
LEONARD GREEN, Clerk

FLOYD PERKINS,)
Petitioner-Appellant,)
v.) ORDER
G. MCQUIGGIN,)
Respondent-Appellee.)

Floyd Perkins, a Michigan prisoner proceeding pro se, moves this court for a certificate of appealability, *see* Fed. R. App. P. 22(b), to appeal a district court order denying his amended petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

In 1993, a jury convicted Perkins of murder. He pleaded guilty to being a second habitual offender and was sentenced to life imprisonment. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal in 1996 and 1997. In 1998, Perkins filed a motion for relief from judgment in state court. It was denied on an unknown date, and Perkins did not appeal. In 2008, Perkins filed a § 2254 petition, later replaced by an amended petition, raising five grounds for relief: (1) the weight of the evidence was not great enough to sustain the conviction; (2) the trial court failed to instruct the jury on the proper use of accomplice testimony; (3) the trial court failed to give preliminary instructions; (4) the prosecutor engaged in

misconduct; and (5) trial counsel rendered ineffective assistance by failing to request critical instructions.

The magistrate judge issued a report recommending that Perkins's petition be denied as barred by the statute of limitations. Perkins objected, arguing that the statute of limitations should have commenced under 28 U.S.C. § 2244(d)(1)(D), i.e., from the date on which the factual predicate of his claims could have been discovered. He also argued that, even if his petition were filed outside the one-year limitations period, he was entitled to equitable tolling based on a claim of actual innocence. To support his actual innocence claim, Perkins presented the district court with affidavits from three other people that implicated another person in the crime. The most recent affidavit was signed in 2002, about six years before Perkins filed his petition.

The district court found that, even by commencing the statute of limitations under § 2244(d)(1)(D), Perkins's petition was untimely. The district court also concluded that Perkins was not entitled to equitable tolling based on his claim of actual innocence. Accordingly, it issued an order adopting the magistrate judge's report and recommendation and denying the petition.

Perkins, who concedes that his petition was filed outside of the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1), argues that this court should certify whether he was entitled to equitable tolling.

A prisoner seeking to appeal the denial of his § 2254 petition must first obtain a COA by making "a substantial showing of the denial of a constitutional

right." 28 U.S.C. § 2253(c)(1)(A) and (c)(2). When, as here, relief has been denied on a procedural ground, the petitioner must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A petitioner who misses the one-year statute of limitations deadline "may still maintain a viable habeas action if the court decides that equitable tolling is appropriate," though the petitioner maintains the burden of demonstrating entitlement. *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). "To be entitled to equitable tolling, [a petitioner] must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Because Perkins filed his petition about six years after he obtained the latest affidavit, Perkins failed to diligently pursue his rights. Jurists of reason would not disagree that Perkins failed to demonstrate entitlement.

A credible claim of actual innocence, however, can also provide a basis for equitable tolling of the § 2244(d)(1) statute of limitations. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995); *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005). But "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." *Schlup*, 513 U.S. at 321. The district court concluded that Perkins was not entitled to equitable

tolling under the actual innocence exception because he was not diligent in pursuing his rights.

Because this court finds that jurists of reason could debate the district court's conclusion that reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling, a certificate of appealability will issue.

The Clerk's Office is directed to appoint counsel for Perkins and to issue a briefing schedule as to the following issue: whether reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

FILED
DEC 1 2 2012

No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a one-year statute of limitations for filing a habeas petition. In *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010), this Court affirmed that a habeas petitioner is entitled to equitable tolling of that one-year period "only if he shows: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." This petition presents two recurring questions of jurisprudential significance involving equitable tolling under AEDPA that have divided the circuits:

1. Whether there is an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that "prevented timely filing" of a habeas petition.

2. If so, whether there is an additional actual-innocence exception to the requirement that a petitioner demonstrate that "he has been pursuing his rights diligently."

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. Petitioner is Greg McQuiggin, Warden of a Michigan correctional facility. Respondent is Floyd Perkins, an inmate.

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The opinion of the court of appeals, Pet. App. 1a–23a, is reported at 670 F.3d 665. The opinion of the district court, Pet. App. 25a–33a, is not reported but is available at 2009 WL 1788377. The opinion of the state court of appeals, Pet. App. 42a–46a, is not reported.

JURISDICTION

The court of appeals' judgment was entered on March 1, 2012, App. 24a. A petition for rehearing was denied on April 26, 2012, App. 47a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND COURT RULE INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified in relevant part at 28 U.S.C. § 2241 *et seq.*), provides in § 2244:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Mich. Ct. R. 6.502 Motion for Relief From Judgment

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

* * *

(G) Successive Motions.

* * *

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment *or a claim of new evidence that was not discovered before the first such motion.* The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions. [Emphasis added.]

INTRODUCTION

It is not unusual for a convicted criminal to claim he has discovered new evidence of his innocence that he believes serves as a gateway to review a time-barred federal constitutional claim. Indeed, the Antiterrorism and Effective Death Penalty Act (AEDPA) allows an incarcerated inmate to file a habeas petition up to one year after the discovery of new evidence that gives rise to an independent constitutional claim, no matter how much time has elapsed since the conviction. 28 U.S.C. § 2244(d)(1)(D). And this Court has recognized that new evidence supporting a credible claim of actual innocence can serve as a gateway to review claims of federal constitutional error that otherwise are procedurally barred.

It is less common for a prisoner to discover new evidence but then sit on it for several years. Section 2244(d)(1)(D) bars such a prisoner from filing a habeas petition because the delay undermines a competing state interest that grows as time passes: a prosecutor cannot adequately respond to a constitutional claim based on new evidence when witnesses have died or moved away, memories have grown stale, and evidence has deteriorated. That is why Congress, in § 2244(d)(1)(D), required habeas petitioners relying on new evidence to (1) file their habeas claim within a year after discovering the evidence, and (2) pursue their rights diligently. These modest requirements are entirely consistent with post-judgment motion and habeas practice since this country's founding; they also are aligned with a rational defendant's desire for prompt review of his constitutional claims.

Respondent seeks to upset the delicate balance Congress crafted. Perkins, a convicted murderer, claims ineffective assistance of counsel and presents three affidavits that purportedly show his innocence. Perkins obtained these affidavits over a five-year, post-conviction period, then waited six years after receiving the final affidavit before filing a petition. Perkins concedes he did not act diligently but asks the Court to "toll" § 2244(d)(1)(D)'s one-year limitations period indefinitely. The Court should reject that request.

To begin, the notion of indefinite tolling conflicts with § 2244(d)(1)(D). Congress expressly contemplated the scenario in which new evidence materializes years after a conviction, and it created a one-year window to request habeas relief based on that evidence. Indefinite tolling upsets the careful equilibrium between allowing an inmate's constitutional claims that are supported by new evidence to move forward, on the one hand, and state federalism concerns on the other. It would be exceedingly strange for Congress to have included a one-year limitations period and a diligence requirement in § 2244(d)(1) if Congress believed a defendant could circumvent both simply by claiming innocence.

In fact, Perkins is not even advocating for *tolling* in the traditional sense. Tolling is a temporary halt in a limitations period based on some circumstance beyond an individual's control. What Perkins seeks is an unqualified *abrogation* of § 2244(d)(1)'s limitations period based on a circumstance entirely within his own control: pursuit of his own constitutional claim. Congress enacted AEDPA to limit a convicted defendant's habeas rights; the Court should not allow Perkins to use AEDPA to expand those rights.

Enforcing Congress's intent as expressed by the plain language of § 2244(d)(1)(D) will not deprive a potentially innocent but non-diligent inmate of a remedy; it merely cuts off Perkins' federal habeas remedy. Michigan allows inmates to file successive motions for relief from judgment based on new evidence without imposing a limitations period. Mich. Ct. R. 6.502(G)(2). So Perkins can pursue his stale claim, provided he pursues it in a state forum. Perkins also can seek executive clemency, a process this Court has long recognized as the proper venue for a prisoner claiming innocence but lacking a judicial remedy. Conversely, allowing Perkins to circumvent § 2244(d)(1)(D)'s requirements violates fundamental principles of federalism in the post-conviction process.

Accordingly, the State of Michigan respectfully requests that the Court reverse the court of appeals, enforce § 2244(d)(1)(D), and bar Perkins from pursuing his time-barred ineffective-assistance claim.

STATEMENT OF THE CASE

A. AEDPA's one-year limitations period

Congress enacted AEDPA in the wake of the 1993 World Trade Center and 1995 Oklahoma City bombings. Intended to limit the scope of federal habeas review, AEDPA prohibits habeas relief unless the state-court adjudication of a defendant's constitutional claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of" this Court's decisions, or "(2) resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Section 2244(d)(1) creates a one-year limitations period for filing a habeas petition. That year begins to run from the latest of (A) the date the conviction became final, (B) the date a state-created filing impediment was removed, (C) the date this Court created a new constitutional right deemed retroactive on collateral review, or, the focus here, (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1).

Section 2244(d)(1)(D) allows constitutional claims based on "new evidence" (a previously undiscovered factual predicate that supports a claim of constitutional error) to be brought long after conviction. But by requiring a filing within one year after discovery, § 2244(d)(1)(D) promotes the public's interest in the prompt assertion of habeas claims, a state's interest in litigating issues while still fresh, and the convicted defendant's interest in securing release.

B. The murder

Respondent Floyd Perkins "talked a lot about killing people." J.A. 4. Perkins once divulged that if he *were* to kill someone, he would stab the victim in the head, torture the victim, and drag the body off. J.A. 5–6, 22–23. Then Perkins would go home and act "[l]ike nothing happened." J.A. 5–6. Perkins' fantasy is eerily similar to the actual murder of Rodney Henderson.

Perkins believed that Henderson snitched on him about a stolen car. J.A. 69–70. The die was cast; as Perkins told Torriano Player: "Rodney gots to go." J.A. 68. Perkins repeatedly told another friend, Chauncy Vaughn, that he would kill Henderson. J.A. 25.

On the day of the murder, Perkins attended a party with Henderson and Vaughn, where they met 15-year-old DeMarr Jones. J.A. 25. Perkins claims Jones was the sole murderer. While at the party, Perkins revealed his plan to Vaughn: "hey, Chuck, I'm going to go ahead and do it. . . . Go ahead and get it over with." J.A. 27. Perkins' plan was to take Henderson to a trail behind Dukette School. J.A. 30. Vaughn understood that Perkins was talking about killing Henderson and implored him "not to do it." J.A. 29.

Perkins ignored Vaughn and left the party with Henderson and Jones, then suggested that the three of them go to a store to buy alcohol. J.A. 30, 51–52. While Henderson was outside the store, Perkins told Jones: "I'm going to do Rodney." J.A. 52. Back outside, Perkins suggested that they walk down the Dukette Trail to meet some girls. J.A. 53.

Perkins apparently invited Jones to help and invented a signal so Jones would know when to begin assaulting Henderson; Perkins would say "it's cold." J.A. 37–38. As the group walked down the path, Perkins pronounced "it's cold," but Jones apparently wasn't ready to attack. J.A. 38, 54. Perkins repeated "it's cold," turned around, and saw Henderson's back to him. J.A. 38, 55. So Perkins pulled out his knife and began stabbing Henderson. *Id.* Henderson fell to the ground and begged for his life: "all right man, quit, whatever I did, I'm sorry." J.A. 55. Ignoring Henderson's pleading, Perkins played with his victim, repeatedly cutting and slicing Henderson's neck, face, and lower lip. J.A. 16–22. The torture ended with a final penetrating stab through Henderson's skull into his brain. J.A. 19.

Perkins and Jones arrived at Vaughn's house roughly one hour after they had left the party with Henderson. J.A. 30–31. Perkins informed Vaughn that "it's done," referring to Henderson's murder. J.A. 31. Perkins and Jones then went to the rest room and turned on the faucet. Vaughn "concluded they washed themselves off." J.A. 32.

Later, Perkins called Vaughn and confessed in detail to the murder he had committed. J.A. 37–38. Perkins described that he was walking down the path with Henderson and Jones and gave the signal that "it was cold." *Id.* Perkins also described how he stabbed Henderson from behind. J.A. 38.

Meanwhile, Torriano Player knew his friend Henderson was missing. J.A. 71. Vaughn told Player that Perkins had confessed to killing Henderson. J.A. 34, 72. Distraught, Player went to see Perkins and told him that he "didn't want Rodney's body just laying out there in the snow." J.A. 73. Perkins said he understood. *Id.* After Player promised that he "wasn't gonna snitch on" Perkins, Perkins disclosed where Henderson's body was. *Id.*

Player understandably was upset that Perkins had killed his friend. J.A. 74. This troubled Perkins, who said that he "wouldn't have . . . killed" Henderson if he had known that the murder would come between himself and Player. *Id.* Perkins later confessed to Vaughn that if Perkins "couldn't have Torry [Player] . . . he might as well turn himself in." J.A. 35. Later, Perkins did just that, hoping to "make things better" with Player. J.A. 76.

C. The trial and direct appeal

At trial, Perkins admitted that he, Henderson, and Jones left the party together and went to the store. J.A. 84. But Perkins claimed that when he exited the store, Henderson and Jones were gone, so he went to hang out with his girlfriend, Denise Hunter (the mother of his child) and Peter Junior, the two alibi witnesses Perkins called at trial. J.A. 84, 86–88, 101–105, 106–11. Perkins said that, after he left Junior and Hunter, he saw Jones standing under a street light, covered with blood. J.A. 89–90.

The prosecutor told the jury that Jones likely had a role in Henderson's death, but that the evidence demonstrated Perkins' guilt. J.A. 113–14. Indeed, the crime was entirely consistent with what Perkins had told his friends, Vaughn and Player, he planned to do; occurred exactly the way that Perkins described it to Vaughn over the phone after-the-fact; and was the only way to make sense of Perkins' post-murder "apology" to Player and his decision to turn himself into the police.

The jury rejected Perkins' alibi defense and found him guilty of first-degree murder, and the Michigan trial court sentenced Perkins to life in prison.[1] The Michigan Court of Appeals affirmed, Pet. App. 42a–46a, and the Michigan Supreme Court denied leave to appeal on January 31, 1997, Pet. App. 41a.

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[1] The Sixth Circuit panel said that what happened "is in dispute." Pet. App. 3a. That statement is true in virtually every criminal case. But the panel failed to recognize that a jury found Perkins guilty beyond a reasonable doubt.

D. Perkins' untimely habeas petition

Absent the discovery of new evidence of innocence, AEDPA required Perkins to file his petition for habeas corpus within one year of his conviction, i.e., no later than May 5, 1998. 28 U.S.C. § 2244(d)(1)(A). He did not. Instead, Perkins waited until June 13, 2008, to file—more than 10 years later.

To circumvent § 2244(d)(1)'s one-year limitations period, Perkins alleged that new evidence of actual innocence supported his ineffective-assistance claim. That evidence consisted of three affidavits, one each from Perkins' sister, a friend's younger brother, and a dry-cleaning clerk named Linda Fleming. Pet. App. 4a. The affidavits purport to corroborate the same defense ("Jones did it") the jury rejected. And Perkins admits he knew his sister's statement at the time of trial.

The three affidavits were dated January 30, 1997, March 16, 1999, and July 16, 2002. Pet. App. 4a. Thus, even under a "new evidence" theory, AEDPA's one-year limitations period expired on July 16, 2003, at the latest. Pet. App. 4a. But Perkins did not file his petition until June 13, 2008—nearly five years later. Pet. App. 4a.

E. District court proceedings

The district court denied Perkins' petition because the affidavits failed to satisfy the strict standard for proving actual innocence in support of a constitutional claim: new, reliable evidence that demonstrates factual innocence, not mere legal insufficiency. Pet. App. 30a (citing *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995)).

Alternatively, the district court said that the Sixth Circuit's decision in *Souter* v. *Jones*, 395 F.3d 577 (6th Cir. 2005)—which allowed equitable tolling of § 2244's one-year limitations period—does not mean that an actual-innocence claim tolls the limitations period indefinitely. Pet. App. 31a. "[T]he Supreme Court has clearly indicated that equitable tolling, regardless of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights." Pet. App. 31a (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Accord *Holland*, 130 S. Ct. at 2562 (equitable tolling of AEDPA's one-year limitations period requires petitioner's diligent pursuit).

F. Sixth Circuit ruling

The Sixth Circuit reversed. Relying on its previous decision in *Souter*, the Sixth Circuit first held that Perkins' "gateway actual innocence claim" allowed him to present his habeas petition "as if he had not filed it late." Pet. App. 8a. The Sixth Circuit said that nothing in this Court's *Holland* analysis calls *Souter* into question. Pet. App. 9a–11a. That is because *Holland* "does not indicate that a credible claim of actual innocence is not . . . an 'appropriate' case" for tolling. Pet. App. 11a. The Sixth Circuit so held even though *Holland* specifically tied equitable tolling to an extraordinary circumstance that "*prevented timely filing*"—a prerequisite that does not exist when a habeas petitioner can cite no reason for filing his petition many years after discovering the purported new evidence. The Sixth Circuit was satisfied that the "majority of circuits that have considered the actual-innocence gateway post-*Holland* agree" with *Souter*. Pet. App. 12a.

Next, again relying on *Souter*, the Sixth Circuit held that Perkins need not even prove reasonable diligence to invoke equitable tolling. Pet. App. 16a. The Sixth Circuit acknowledged that this Court's language in *Holland* regarding diligence "is seemingly at odds" with *Souter*. Pet. App. 14a. But the court distinguished *Holland* and *Pace* because neither involved an actual-innocence theory. Pet. App. 16a. "In fact, the Supreme Court has never required reasonable diligence to be shown when seeking equitable tolling due to actual innocence," said the court. Pet. App. 16a.

Finally, the Sixth Circuit declared that whether Perkins "is actually innocent is not for us to decide." Pet. App. 20a. The court remanded "so that the district court may *fully* consider whether Perkins asserts a credible claim of actual innocence." Pet. App. 21a (emphasis added).

SUMMARY OF ARGUMENT

1. Congress enacted in AEDPA a provision to address precisely the situation presented here: a defendant's unexcused delay in bringing a habeas action that asserts a constitutional claim based on new evidence.

To encourage expediency and mitigate the dangers of delay, Congress implemented a one-year limitations period that runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The Sixth Circuit examined this text; dismissed it as inequitable for a petitioner who, like Perkins, claims actual innocence; and replaced it with an indefinite tolling rule.

It is true that this Court in *Holland* held that AEDPA's generic one-year limitations period "is subject to equitable tolling in appropriate cases." 130 S. Ct. at 2560. The Court declined to construe AEDPA "to displace courts' traditional equitable authority absent the clearest command," *id.* at 2560–61 (quotations omitted), and Congress enacted AEDPA aware that the Court "would apply the presumption." *Id.* at 2561. Accordingly, a habeas petition can avoid AEDPA's generic one-year limitations period if an extraordinary circumstance prevented the timely filing and the petitioner can show that he pursued his claim diligently. *Holland*, 130 S. Ct. at 2562.

But there is no traditional equitable authority that justifies Perkins' indefinite tolling theory for habeas claims based on new evidence. To the contrary, American courts traditionally have required that criminal defendants present new-evidence claims promptly, within a finite period of time. And it makes no sense to assume that Congress created a one-year window for filing a constitutional claim based on new evidence all the while assuming that federal courts would not apply the limitation to the "rare" instance when a defendant claims he is innocent.

There is injury to the federal-state relationship when federal courts allow a defendant an indefinite time to file a federal habeas claim based on new evidence. Reexamining state convictions on federal habeas impinges on state sovereignty and the notion that states have the capability to prosecute, convict, and sentence criminals in accord with state law and processes. The Court should reject Perkins' request to abrogate § 2244(d)(1)(D) with an indefinite tolling rule.

2. The Sixth Circuit did not stop at allowing Perkins to circumvent § 2244(d)(1)(D)'s one-year limitations period. The court also eliminated any requirement that a habeas petitioner act diligently when pursuing a constitutional claim based on new evidence. Again, there is no equitable principle that justifies such a result. Since at least 1851, American courts have required convicted defendants to present new evidence in a diligent manner. That approach is consistent with a bedrock equitable principle: a person cannot ask a court to use its equitable powers to excuse his or her own lack of diligence. And that principle aligns precisely with the interests of an actually innocent defendant's interest in having his underlying constitutional claim adjudicated timely.

What Perkins seeks—indefinite tolling—is not actually *tolling* at all. "Tolling" contemplates a temporary cessation of the running of the limitations period due to an event beyond the petitioner's control. What Perkins seeks, and what the Sixth Circuit ratified, is a wholesale abrogation of the one-year window for filing in habeas a constitutional claim based on new evidence. Equity has never recognized such a rule.

Perkins can find no support for his indefinite-tolling theory without any diligence requirement in this Court's gateway actual-innocence cases. In those cases, a habeas petitioner does not seek to use new evidence to prove his underlying constitutional claim; the new evidence merely establishes the "gateway" that allows the petitioner to litigate a procedurally defaulted claim in the circumstance where the petitioner is unable to prove cause and prejudice.

In contrast here, Perkins seeks to use new evidence to *prove* his underlying ineffective-assistance claim. Section 2244(d)(1)(D) does not even apply unless the new evidence that creates the one-year filing window is the factual predicate for the underlying constitutional claim or claims the petitioner seeks to pursue. 28 U.S.C. § 2244(d)(1)(D).

Moreover, in every case in which the Court has allowed a petitioner to use an actual innocence claim as a gateway to review of a federal constitutional violation, the petitioner raised that federal claim in a diligent manner. The Court never has exercised its equitable power to create an unlimited time frame for filing a habeas claim based on claims of innocence.

3. There is no need to abrogate AEDPA's limitations period to create a federal remedy in this case when Perkins has alternate state-law remedies available. For example, Michigan allows a convicted defendant to file successive motions seeking relief from judgment based on new evidence, and it does so without any time limitation. Mich. Ct. R. 6.502(G)(2). And this Court has long recognized that the power of clemency is the traditional guardian against miscarriages of justice where there is no judicial remedy. The courts should not usurp the post-conviction processes Michigan has adopted by disavowing the federal limitation Congress created.

For all of these reasons, the Court should reject Perkins' theory that he can indefinitely toll § 2244(d)(1)(D)'s one-year limitations period simply by asserting his innocence.

ARGUMENT

I. There is no actual-innocence exception to § 2244(d)(1)(D)'s one-year window for filing in habeas a constitutional claim based on new evidence.

A. Section 2244(d)(1)(D)'s text forecloses any argument that a habeas petitioner has unlimited time to present new evidence in support of a constitutional claim.

Section 2244(d) establishes a detailed system for determining when AEDPA's one-year limitations period begins to run. Included within that system is a specific trigger for the precise circumstance presented here: a constitutional claim based on new evidence. Congress anticipated this situation and said that the one-year window for filing such a claim runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

Congress also provided for petitioners who already filed a petition for habeas relief, only to discover new evidence after that proceeding concluded. In 28 U.S.C. § 2244(b)(2)(B), Congress lifted AEDPA's prohibition on successive petitions where facts underlying a new claim would establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. So there is no need for the courts to act in equity to provide additional time for persons who allege actual innocence as a gateway to their claims of constitutional error. Congress opened the gate by enacting § 2244.

Perkins' request for indefinite tolling renders superfluous this carefully scripted scheme. Under Perkins' theory, it does not matter how long a defendant waits after he discovered, or should have discovered, new evidence. According to Perkins, a habeas petitioner can uncover a new witness, convert the witness's testimony to an affidavit, wait 50 years or longer, and then file a constitutional claim in federal court based on that new evidence.

Perkins' proposed rule encourages gamesmanship. If a defendant believes new evidence is strong enough to both overcome the state's evidence against him and establish an underlying constitutional claim, he will file promptly. But if the evidence may be insufficient to withstand countervailing testimony at a hearing, a defendant with a long sentence has incentive to delay, such as waiting for the death of an elderly prosecution witness. That ability to simply "outwait" the evidence places the prosecution at a severe disadvantage.

In sum, § 2244(d)(1)(D)'s language is clear, unambiguous, and supported by valid policy reasons regarding finality of convictions. As Judge Easterbrook put it, although § 2244 "leaves some (limited) room for equitable tolling, courts cannot alter the rules laid down in the text." *Escamilla* v. *Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005) (citation omitted). "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing. Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Id.*

B. Equity provides no basis for discarding the time limit § 2244(d)(1)(D) creates.

In *Holland*, this Court held that AEDPA's general one-year statute of limitations was subject to equitable tolling. *Holland*, 130 S. Ct. at 2560. That decision was based, in part, on the Court's recognition of long-standing equitable principles that allowed federal courts to excuse a failure to comply with federal timing rules. *Id.* That is, when Congress enacted the one-year statute of limitations, it did so with the full knowledge that such limitations periods normally are subject to equitable tolling. Because Congress did not use language that specifically called these equitable powers into question, this Court concluded that "basic habeas corpus principles" under which "a petition's timeliness was always determined under equitable principles" remained in force. *Id.* at 2562. Thus, this Court recognized that AEDPA's general one-year limitations period for state prisoners seeking federal habeas relief is subject to equitable tolling, but only if the petitioner makes two threshold showings: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way' and prevented timely filing." *Id.* at 2562 (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Application of the same analysis here compels rejection of Perkins' position that § 2244(d)(1)(D) is amenable to equitable abrogation. That is because there is no equitable tradition of allowing defendants who claim actual innocence an indefinite period of time to file a constitutional claim based on new evidence. American courts historically have required *timely* filing of post-judgment claims based on new evidence.

New trials were not available in England until the close of the 17th century, and then they primarily were available only for misdemeanor cases. *Herrera* v. *Collins*, 506 U.S. 390, 408 (1993) (citation omitted). Common-law courts created a remedy for an accused seeking to correct an error of fact by a proceeding called a writ *coram nobis*. *Sanders* v. *Indiana*, 85 Ind. 318, 325; 1882 WL 6389 (Ind. 1882). The writ was commonly used in civil cases and was seldom relied on in criminal matters. *Id.* The errors addressed by the writ related primarily to defective process or a party's capacity. Morgan Prickett, *Writ of Error Coram Nobis in California*, 30 Santa Clara L. Rev. 1, 3 (1990). In a note to Blackstone's Commentaries, Judge Thomas M. Cooley noted that the writ *coram nobis* "was necessary to suggest a new fact upon the record from which the error in the first judgment will appear[.]" *Id.* (quoting W. Blackstone, Commentaries on the Laws of England (T. Cooley ed. 1899)). While the writ was not subject to a statute of limitations, parties seeking a remedy under a writ *coram nobis* were required to prove that they had proceeded with reasonable diligence. *Tennessee* v. *Mixon*, 983 S.W.2d 661, 667 (Tenn. 1999) (citing 18 Am. Jur. 2d *Coram Nobis and Allied Statutory Remedies* § 31 (1985)).

In accord with the English practice, the U.S. Constitution says nothing about new trials, whether they are based on new evidence or otherwise. *Id.* In fact, as explained by the Supreme Court of Kansas, "in no case is it held [that a right to a new trial is] a constitutional grant. It is a *privilege* offered by the law to the accused, in addition to the *guaranties* offered by the Constitution." *Kansas* v. *McCord*, 8 Kan. 232; 1871 WL 765, at *5 (Kan. 1871).

Congress acted to extend that privilege, but subject to traditional restrictions. The First Congress enacted legislation allowing new trials for "reasons for which new trials have usually been granted in courts of law." 1 Stat. 83. But like § 2244(d)(1)(D), the courts imposed very strict time limits. "The early federal cases adhere[d] to the common-law rule that a new trial may be granted only during the term of court in which the final judgment was entered." *Herrera*, 506 U.S. at 408 (citations omitted). A court in a subsequent term was limited to correcting "inaccuracies in mere matters of form, or clerical errors." *Id.* (citation omitted).

By the middle of the 20th century, courts and legislatures began to provide defendants with expanded—but still strictly limited—time to file a motion for a new trial. For instance, in 1929, Wisconsin enacted a statute that allowed defendants to file a motion for a new trial "at the term in which the trial of any indictment or information shall be had or within one year thereafter." Wisc. Stat. 1929, § 358.06. Connecticut allowed defendants to file a motion for a new trial up to three years after judgment. Conn. Gen. Stat., 1930, § 6560. This Court adopted an expanded 60-day time frame to file a motion for a new trial based on newly discovered evidence. *Herrera*, 506 U.S. at 408. Following the creation of the 60-day rule, there was substantial debate over whether the time limit should be abolished or whether to retain a time limit in order to promote finality. *Id.* This Court answered that question by adopting Federal Rule of Criminal Procedure 33, which provides defendants with what is now a three-year time limit after the verdict for filing new trial motions based on new evidence. *Id.*; Fed R. Crim. P. 33(1)(a).

Now consider AEDPA, a statute intended to "curb the abuse of the statutory writ of habeas corpus." H.R. Rep. No. 104-518, at 111 (1996). In adopting AEDPA, Congress sought to "compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances." *David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (citing 28 U.S.C. § 2244(d)(1)(A)–(D); H.R. Rep. No. 104-518, at 111 (1996)).

Amidst the reforms, Congress implemented a safety valve. Section 2244(d)(1)(D) allows a petitioner to present new evidence to establish that a constitutional violation occurred at his trial. The time within which to file a claim based on new evidence starts to run on the date the petitioner discovers—or with reasonable diligence should have discovered—that new evidence.

In other words, § 2244(d)(1)(D) recognizes the need to provide a petitioner additional time if he *could not have filed* his petition earlier based on the unavailability of newly discovered evidence. But "one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack." *David*, 318 F.3d at 348. Unlike the equitable tolling that this Court applied in *Holland*, Perkins does not invoke "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland*, 130 S. Ct. at 2561 (quotations omitted). There was no reason for Congress to create a one-year window for filing claims based on new evidence if a petitioner could simply circumvent the limitations period by claiming actual innocence.

At bottom, Perkins is not actually asking this Court to toll § 2244(d)(1)(D) at all. The concept of tolling is that it suspends the running of a limitations period; once the tolling ends, the limitations period begins running again. *Chardon* v. *Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) ("tolling" means that "during the relevant period, the statute of limitations ceases to run"). Under Perkins' approach, however, the limitations period never begins to run again—not on the date he discovered new evidence, not on the date he could have discovered new evidence, not on any date. That it is not tolling—it is wholesale abrogation.[2]

As noted above, Congress did not intend to abrogate AEDPA's limitations period whenever a petitioner asserts a claim (colorable or not) of actual innocence. To the contrary, Congress specifically addressed the intersection of the limitations period and actual innocence claims in § 2244(b) and (d)(1)(D). And it does not matter whether § 2244(d)(1)(D) is characterized as an accrual provision or a tolling provision. See *Holland*, 130 S. Ct. at 2561–62. Congress decided that a petitioner has one year from the date on which new evidence could have been discovered to file his petition, and it enacted a statute that serves the same purpose as equitable tolling. That policy judgment cannot be set aside, particularly in the absence of a "strong equitable claim" (such as extraordinary circumstances) that otherwise would justify keeping the federal courthouse doors open. *Id.* at 2562.

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[2] Perkins has said that his position does not make § 2244(d)(1)(D) a nullity because a petition still must "demonstrate a credible claim of actual innocence before a court will reach the merits of his constitutional claims." Br. in Opp. 13. That argument ignores § 2244(d)(1)(D)'s purpose—to bar stale claims altogether.

C. There are high costs to allowing an indefinite time within which to file a federal claim based on new evidence.

This Court has recognized "the significant costs of federal habeas corpus review." *McCleskey* v. *Zant*, 499 U.S. 467, 490–91 (1991). The writ "strikes at finality." *Id.* at 491. And "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Id.* (quoting *Teague* v. *Lane*, 489 U.S. 288, 309 (1989)). Whenever a habeas petitioner obtains a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." *Id.* (quotation omitted).

"Finality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491 (citations omitted). "Reexamination of state convictions on federal habeas frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (quotations omitted). While our federal system acknowledges state power to uphold societal norms by enacting criminal laws, "the power of a State to pass laws means little if the State cannot enforce them." *Id.*

There are additional costs of habeas review. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey*, 499 U.S. 491 (citation omitted). And "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.* at 491–92 (citations omitted).

Moreover, "principles of federalism and comity [are] at stake" when state prisoners attempt to use the federal courts to attack their final convictions. *District Attorney's Office* v. *Osborne*, 557 U.S. 52, 76 (2009) (Alito, J., concurring). This Court has defined "comity" as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

Allowing a state prisoner to lie in wait and use stale evidence to collaterally attack his conviction in federal court at a time of his own choosing (e.g., when an elderly witness has died and cannot appear at a hearing to rebut the new evidence) is fundamentally inconsistent with federalism and comity. Here, for instance, Perkins' trial took place *19 years ago*. The federal courts should respect Congress's policy decision to deny a federal habeas remedy and instead defer to states regarding whether and how to process such a claim.[3]

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[3] While there is already some prejudice to a state in defending a constitutional claim filed pursuant to § 2244(d)(1)(D), its ability to contradict new evidence is further compromised when the evidence supporting the constitutional claim is itself stale. Here, the affidavit of the only disinterested witness, Linda Fleming, the dry-cleaning clerk, was obtained a decade ago. Any evidence that would confirm or refute her affidavit is likely undiscoverable, leaving Michigan in a federal proceeding at the mercy of Fleming's fallible memory.

II. There also is no actual-innocence exception to the traditional requirement that a convicted defendant act diligently in pursuing his claims for relief from judgment.

A. Equity always requires a claimant to diligently pursue his claims.

Even when allowing for equitable tolling in *Holland*, this Court maintained the long-recognized equitable requirement that a party who invokes tolling must show "that he has been pursuing his rights diligently." *Holland*, 130 S. Ct. at 2562. There is no equitable principle that allows a court to simply disregard a limitations period altogether, regardless of timeliness or diligence. Perkins' theory—that he need not demonstrate diligence to "toll" § 2244(d)(1)(D) indefinitely because he claims actual innocence—swims against the currents of history.

American courts and state legislatures consistently have followed the common-law requirement that a defendant present new evidence in a diligent manner. That trend can be traced as far back as 1851, when the Georgia Supreme Court required a convicted defendant seeking a new trial based on newly discovered evidence to prove that "it was not owing to the want of due diligence that [the motion] did not come sooner." *Berry* v. *Georgia*, 10 Ga. 511; 1851 WL 1405, at *12 (Ga. 1851). Other States followed suit, adopting the *Berry* rule "to protect [the Court] from imposition[.]" *Missouri* v. *McLaughlin*, 27 Mo. 111; 1858 WL 5874, at *1 (Mo. 1858). Federal courts have "frequently quoted and followed" the *Berry* rule. *United States* v. *Johnson*, 327 U.S. 106, 110 n.4 (1946).

Congress imposed one kind of diligence in § 2244(b) and (d)(1)(D), requiring a habeas petitioner to diligently pursue new evidence to take advantage of (d)(1)(D)'s extension of the limitations period. But if there is to be equitable "tolling" of § 2244(d)(1)(D)'s one-year window, equity requires a second kind of diligence—diligent pursuit of the legal claim. Federal courts "have typically extended equitable relief only sparingly," allowing tolling only in those situations "where the claimant has actively pursued his judicial remedies." *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id.* (citing *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984). Simply put, one "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County*, 466 U.S. at 151.

In sum, a habeas petitioner seeking to bring a constitutional claim based on new evidence has only one year following discovery within which to pursue that federal claim. 28 U.S.C. § 2244(d)(1)(D). But even if this Court were inclined to suspend that limitations period indefinitely for a defendant claiming actual innocence, there is no basis for jettisoning equity's long-standing diligence requirement. Because Perkins has not even alleged, much less proven, that he pursued his ineffective-assistance claim with diligence after he obtained the three new affidavits, there is no equitable basis on which to relieve him of the one-year limitations period.

B. Requiring a habeas petitioner to pursue diligently a constitutional claim based on new evidence is not inconsistent with this Court's decisions excusing a procedural bar based on actual innocence.

The Sixth Circuit agreed to dispense with diligence as a prerequisite to equitable tolling based on this Court's *House* v. *Bell* line of cases, which consider actual innocence as a "gateway" to review procedurally barred claims without regard to cause and prejudice. Pet. App. 16a. See *House* v. *Bell*, 547 U.S. 518 (2006). For three reasons, the Sixth Circuit erred.

First, there is nothing incongruous about allowing a defendant claiming actual innocence to overcome a *procedural* bar without showing more, while a defendant asserting a constitutional claim based on *new evidence* under § 2244(d)(1)(D) must diligently pursue that claim. A defendant seeking to litigate a claim that he procedurally defaulted cannot expand the record with the evidence he presents to prove his innocence. That evidence is merely the "gateway" to arguing the underlying but defaulted constitutional claim.[4]

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[4] This Court explained the difference between a "gateway" innocence claim and a freestanding innocence claim in *Schlup* v. *Delo*, 513 U.S. 298, 315 (1995):

> Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."

For example, consider a defendant convicted of sexual assault who tries to raise a procedurally defaulted ineffective-assistance claim based on the failure to call an alibi witness. Assume further that the defendant cannot show cause and prejudice. If the defendant uncovers exculpatory DNA evidence, he can use that evidence of innocence as a gateway to have a court consider his ineffective-assistance claim, but the DNA evidence cannot be used to prove that claim. Excusing a procedural default based on an actual innocence claim does not invite the use of stale evidence, as does the situation presented here.

Now consider Perkins. He is attempting to use the alleged new evidence of his innocence—the affidavit testimony of three new witnesses—to *establish* his underlying ineffective-assistance claim; in fact, § 2244(d)(1)(D) only applies if the new evidence that re-opened the one-year filing window is "the factual predicate *of the claim or claims presented*." It is this merits use of new evidence that forces the prosecutor to rebut new testimony such as that presented here, some of which is more than a decade old. And there is no reason why the problem arises only after 10 years; Perkins could have just as easily waited 50 years to bring his claim. Perkins' situation is not at all comparable with that of procedural default.

That is why enforcing traditional notions of equity and requiring diligent prosecution of new evidence supporting a constitutional claim does not render the gateway-of-actual-innocence theory "redundant." Pet. App. 15a. A defendant using new evidence in a timely filing to pursue a procedurally defaulted claim may very well be allowed to proceed. In contrast, a

defendant like Perkins—who claims actual innocence to excuse his lack of diligence in presenting new evidence to support his constitutional claim—is barred by § 2244(d)(1)(D). When a defendant uncovers new evidence, he has one year to file a federal habeas petition raising a constitutional claim based on that evidence. Period.

Second, there is no conflict between *Holland*'s diligence requirement and the *House* holding that a defendant with an "extraordinary" case for actual innocence based on new evidence is excused from procedural fault and may litigate his underlying constitutional claim. See *House*, 547 U.S. at 536–37. In *House* and similar cases, this Court did not address a habeas petitioner's lack of diligence in presenting the new evidence purportedly showing actual innocence; the issue presented was whether a petitioner could overcome procedural default despite an inability to prove cause for and prejudice from the default itself. *House*, 547 U.S. at 536 ("the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration") (quotations omitted); *Schlup* v. *Delo*, 513 U.S. 298, 314–15 (1995) ("Because Schlup has been unable to establish 'cause and prejudice' sufficient to excuse his failure to present his evidence," he "may obtain review of his constitutional claims only if he" establishes an actual-innocence gateway to relief); *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

So even if the *House* line of cases suggests that actual innocence can excuse procedural default, it does not suggest that a defendant can delay indefinitely the assertion of actual innocence based on new evidence. The Court did not address the diligent-pursuit requirement one way or the other.

Finally, *House* involved an equitable exception to an equitable rule created by the Court itself. See *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012) (reaffirming the equitable nature of the cause-and-prejudice standard). Here, by contrast, Congress enacted a specifically applicable statute that Perkins seeks to override. Unlike the *House* cases, Perkins' theory has significant separation-of-powers implications.

III. Enforcing § 2244(d)(1)(D) does not leave Perkins without a remedy.

Rejecting Perkins' invitation to abrogate AEDPA's statute of limitations would not leave Perkins without a remedy; he has at least two others that he can pursue. First, Michigan allows post-judgment motions based on new evidence with no limitations period. Mich. Ct. R. 6.502(G)(2). Second, Perkins can seek clemency from Michigan's governor—the traditional remedy for prisoners who claim actual innocence but who are time barred from asserting a claim based on new evidence. In other words, enforcing § 2244(d)(1)(D) does not deprive Perkins of all remedies—only a federal habeas remedy.

Under Michigan law, a prisoner can file a post-judgment motion based on new evidence with *no* limitations based on time of filing. Mich. Ct. R. 6.502(G)(2). And this rule applies in Michigan even

when that prisoner already has previously filed a post-judgment motion for relief from judgment. *Id.* If the prisoner demonstrates that he has new evidence, he will then attempt to prove that his motion warrants relief under Mich. Ct. R. 6.508, including the familiar "cause and prejudice" test for failing to raise the grounds for relief at an earlier stage of the proceeding. Mich. Ct. R. 6.508(D)(3)(a), (b). But even then, the Michigan trial court "may waive the 'good cause' requirement" if the court "concludes that there is a significant possibility that the defendant is innocent of the crime." Mich. Ct. R. 6.508(D)(3).

It certainly would be a curious application of equity to grant Perkins indefinite tolling for filing a federal claim when he has an adequate state-court remedy to pursue the relief he seeks. And it would be a tremendous imposition on state sovereignty and principles of federalism to force a state to litigate stale habeas claims in federal court when the state already has extended an avenue for relief that is much broader even than that offered in the federal system. The Court should decline Perkins' invitation to do so.

Wholly aside from Michigan's criminal rules of procedure, the historical remedy for preventing miscarriages of justice where the judicial process has been exhausted is to seek executive clemency. *Herrera*, 506 U.S. at 411–12. The power of the executive to act as a court of equity has been a recognized feature of the common law for well over a millennia. *Id.* at 412. Blackstone noted the power of clemency as one of the great achievements of English law—"that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of

equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." *Id.* (quoting 4 W. Blackstone, Commentaries 397).

In the United States, executive clemency has provided the "fail safe" in our criminal justice system. *Herrera*, 506 U.S. 415. The same is true in Michigan, where the state constitution grants the governor the power to grant reprieves, commutations, and pardons after conviction. Mich. Const. art. V, § 14.

In short, Michigan law provides Perkins with two independent avenues by which he can pursue his claim. Reading § 2244(d)(1)(D)'s one-year limitations period out of AEDPA on "equitable" grounds is unwarranted and unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Supreme Court of the United States

GREG MCQUIGGIN,

Petitioner,

v.

FLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether the 1-year limitations period in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1), incorporates the traditional equitable miscarriage of justice exception to procedural defaults—an exception that was firmly rooted in this Court's decisions before AEDPA's enactment and that excused a habeas petitioner's failure to follow proper procedure if the petitioner presented a colorable claim of actual innocence.

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INTRODUCTION

Like most habeas petitioners, Floyd Perkins asserted claims of constitutional error at trial in his federal habeas petition. Unlike most petitioners, however, Perkins coupled those claims with new evidence indicating his actual innocence of the crime of which he was convicted. In the equitable habeas setting, federal courts have always tested the strength of a "gateway" assertion of innocence, even in the face of countervailing federal and state procedural rules. Failing to do so, this Court has held, risks sanctioning an unbearable miscarriage of justice.

That a colorable assertion of innocence requires resolution derives from the writ's equitable nature. "[H]abeas corpus is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and the "Great Writ" thus demands that "a strong equitable claim" be heard. *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). In that respect, innocence is the "ultimate equity," *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.), and so courts have ensured "that federal constitutional errors do not result in the incarceration of innocent persons," *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

To avoid a "fundamental miscarriage of justice" from imprisoning an innocent person, *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (internal citation and quotation marks omitted), the Court has recognized the equitable "miscarriage of justice" exception to procedural default. The exception—which allows federal courts to address procedurally deficient constitutional claims accompanied by a credible showing of innocence—"insure[s] that miscarriages of justice

within [the writ's] reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Before the Antiterrorism and Effective Death Penalty Act (AEDPA), the exception was "'[w]ell defined in the case law,' and 'familiar to federal courts.'" *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *McCleskey v. Zant*, 499 U.S. 467, 496 (1991)). It imposed a demanding standard—that a petitioner show that "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence" not presented at trial. *Schlup*, 513 U.S. at 327. But where the petitioner met this standard, the exception acted as an *independent* basis for habeas review—even if the petitioner failed to diligently pursue his claims. *See McCleskey*, 499 U.S. at 493-95.

AEDPA did not override this longstanding exception. In *Holland*, the Court held that where "equitable principles have traditionally governed," federal courts should not "construe a statute to displace courts' traditional equitable authority absent the clearest command." 130 S. Ct. at 2560 (internal citations and quotation marks omitted). AEDPA lacks a clear command overriding the traditional miscarriage of justice exception. Accordingly, the appellate courts have uniformly recognized after *Holland* that untimely habeas claims may be considered if the petitioner can make a credible showing of innocence. (Pet. App. 16a-20a); *see Rivas v. Fischer*, 687 F.3d 514, 547-52 (2d Cir. 2012); *Lee v. Lampert*, 653 F.3d 929, 932-36 (9th Cir. 2011) (*en banc*); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011); *Lopez v. Trani*, 628 F.3d 1228, 1231 (10th Cir. 2010).

The decision below thus follows the settled path set out by the Court for interpreting AEDPA against

the backdrop of traditional equitable notions. *Schlup* articulates the standard for weighing assertions of innocence as a gateway in the habeas context, and *Holland* confirms that settled equitable notions were not displaced by AEDPA. To the same end is *House v. Bell*, where the Court relied on the miscarriage of justice exception after AEDPA to permit a petitioner to present his claims despite a procedural default in state court. 547 U.S. 518, 538 (2006). And, as the Court has explained, it "would make 'scant sense' to treat AEDPA's statute of limitations," the constraint at issue here, differently "from other threshold constraints on federal habeas petitioners," for instance, the constraint at issue in *House*. *Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012) (quoting *Day v. McDonough*, 547 U.S. 198, 209 (2006)).

While habeas claims may be plentiful, claims of innocence are not. As Judge Friendly observed over 40 years ago, and as the Court more recently confirmed, "'the one thing almost never suggested on collateral attack is that the prisoner [is] innocent of the crime.'" *Schlup*, 513 U.S. at 322 (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970)). In the narrow range of cases where a colorable claim of innocence is alleged, however, courts have not turned away those petitioners on procedural grounds, given the grave possibility of a miscarriage of justice. AEDPA did not command otherwise. Perkins (and others like him) deserves a hearing on whether his new evidence suffices to pass through the actual-innocence gateway, allowing his claims to be heard on the merits. Equity demands no less.

STATEMENT OF THE CASE

On March 4, 1993, Perkins attended a party in Flint, Michigan, with his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three left the party together. Henderson was later discovered on a wooded trail, murdered by stab wounds to the head. (Pet. App. 2a-3a.)

A. The State Trial

Perkins stood on trial for Henderson's murder in the Genesee County Circuit Court. (Sixth Cir. Record 9/20/2010, Appx. 89-90, 556.) He presented evidence that Jones committed the murder and framed Perkins. As Perkins explained the sequence of events, at about 7:30 p.m., Perkins, Henderson, and Chanucy Vaughn, another friend, walked to a party. (JA 78-79.) At the party, Perkins sat at a basement bar and talked with Henderson and Vaughn. (*Id.* at 80-81.) At one point, Perkins joked with Henderson about having to "do you in," which both men laughed about. (*Id.*) As Vaughn testified, "[w]e all played with each other like that." (*Id.* at 40.)

Around 8:30 p.m., Perkins left to visit his girlfriend, Denise Hunter. (*Id.* at 83, 86-87.) Henderson and Jones joined Perkins. (*Id.* at 83.) Along the way, they stopped at the J&P, a convenience store. (*Id.* at 84.) After Perkins purchased wine for Jones, the men left the store. Perkins remembered, however, that he wanted to buy cigarettes, so he re-entered the store alone. (*Id.*) When he returned outside, Henderson and Jones were gone. (*Id.*)

Perkins continued walking to visit Hunter. On the way, he ran into a friend, Peter Junior. (*Id.* at 101-02.) Junior joined Perkins, and the two arrived to see Hunter around 9:20 p.m. (*Id.* at 86, 88, 102,

107-08.) An hour later, Perkins and Junior left together. (*Id.* at 88-89, 104-05.)

The two parted ways near the J&P. (*Id.*) Perkins saw Jones standing under a streetlight, with blood on his pants, shoes, and plaid coat. He was wearing black gloves. When Perkins asked what had happened, Jones said he had been in a fight. Jones appeared to be under the influence of alcohol. (*Id.* at 89-90.)

Perkins went to Vaughn's house, where Jones later arrived, wearing his plaid coat. Jones went straight to the basement, (Sixth Cir. Record 9/20/2010, Appx. 553), emerging in another jacket. (JA 90-91.)

Three days later, on March 7, 1993, Vaughn discovered Jones's plaid jacket in his basement, wedged between a locker and the wall. (*Id.* at 42-43, 46-48.) Vaughn turned the plaid jacket (with black gloves inside the pockets) over to the police. (*Id.* at 45; Sixth Cir. Record 9/20/2010, Appx. 603.) The crime lab determined that the jacket and gloves were soaked with blood. (Sixth Cir. Record 9/20/2010, Appx. 600-03.) Jones admitted that the blood was Henderson's, but claimed that the stains were due to an unrelated nose bleed. (*Id.* at 432, 457-59.)

Perkins testified that he and Henderson never fought. Their relationship was limited to "drink[ing] beer together, talk[ing] to girls, that was it." (JA 95.) Jones, on the other hand, had a motive to kill Henderson, as Jones and Henderson had previously been involved in a car theft, and rumors circulated that Henderson had snitched to the police. (*Id.* at 95-96; Sixth Cir. Record 9/20/2010, Appx. 484, 488.) Perkins

had nothing to do with the stolen car. (Sixth Cir. Record 9/20/2010, Appx. 468.)

At trial, the prosecution admitted that Jones was not "fooling anybody," but that he "just [did not] happen to be on trial." (*Id.* at 646-47.) According to the prosecutor, "nobody is sitting here telling you that Damarr Jones is totally innocent in this. I want you to know that. Nobody's foolish[.]" (JA 114.) Ultimately, the jury found Perkins guilty of first-degree murder. (Sixth Cir. Record 9/20/2010, Appx. 736.) On October 27, 1993, Perkins was sentenced to life in prison without the possibility of parole. (*Id.* at 754.)

B. The Direct Appeal

On appeal, Perkins, through appointed counsel, asserted that he was denied due process when: (1) the trial court failed to instruct the jury regarding the proper weight to be given to accomplice testimony; (2) the trial court improperly failed to give preliminary instructions to the jury; and (3) the prosecutor engaged in various forms of misconduct, including the destruction of Jones's blood-stained gloves. (Dist. Ct. Record 6-3, pp. 1-40.) Perkins raised the additional ground of ineffective assistance of counsel via a Supplemental Brief. (Dist. Ct. Record 6-4, pp. 4-6, 13-22.) Considering only the arguments raised by counsel, the Michigan Court of Appeals rejected them and affirmed Perkins's conviction. (Pet. App. 42a-46a.) The Michigan Supreme Court denied Perkins leave to appeal on January 31, 1997. (Pet. App. 41a.)

C. The State Post-Conviction Proceedings

On January 30, 1998, Perkins, acting *pro se*, filed a motion for relief from judgment under Michigan Court Rule 6.501, *et. seq.* (Dist. Ct. Record 8-3, pp. 18-20.) He again asserted that the trial court erred

by failing to instruct the jury regarding the proper weight of accomplice testimony. (*Id.* at 18-20, 30.) He also asserted that he was denied effective assistance of counsel because his attorney did not investigate evidence of his innocence. (*Id.*)

Perkins attached to his motion an affidavit from his sister, Ronda Hudson. (*See* Dist. Ct. Record 8, pp. 10, 13.) The affidavit, dated January 30, 1997, detailed a conversation between Hudson and Louis Ford in March 1993, the month Henderson was murdered. Ford, who occasionally socialized with Perkins, Jones, and Henderson, told Hudson that he had been at a house where Jones had been bragging about stabbing Henderson. Jones told Ford that he took his clothes to the cleaners and "laughed about it." (Pet. App. 54a-55a.) Ford refused to report this information to the police, but Hudson found a dry-cleaning clerk who remembered a man matching Jones's description entering her store with blood-covered clothing. (*Id.*)

Hudson shared Ford's information with Perkins before trial, and Perkins gave the information to his attorney. (*Id.*; Dist. Ct. Record 8, pp. 4-5.) But the attorney, who showed an utter "disregard for [Perkins] as a client," (JA 128), did not interview Ford, Hudson, or the dry-cleaning clerk. Nor did he call them at trial. (Dist. Ct. Record 8, pp. 4-5.) Instead, he merely asked Jones whether he had sent a pair of pants to the cleaners. Jones denied doing so. (JA 63-64.) The attorney also vaguely referenced Jones's trip to the cleaners when he cross examined witness Marvin Mays. (Sixth Cir. Record 9/20/2010, Appx. 307.) No other impeachment took place. (Dist. Ct. Record 6-2, pp. 16-17.)

While his motion was pending, on August 19, 1999, Perkins filed an amendment asserting that he was entitled to a new trial based on additional evidence. Attached to the motion was an affidavit from Demond Louis, Vaughn's brother, which Perkins obtained on March 16, 1999. (Dist. Ct. R. 8-3, pp. 21-23.) Louis, often referred to at trial as Mugsy, was on the prosecution's witness list. Perkins's attorney, however, did not interview Louis or call him to testify. (Sixth Cir. Record 9/20/2010, Appx. 459, 488; Dist. Ct. Record 6, p. 39; Dist. Ct. Record 6-2, pp. 17, 21.)

In his affidavit, Louis stated that Jones asked to speak to him around 11:00 p.m. on the night of the murder. (Pet. App. 50a.) Jones then "bragged, confessing . . . that he had just killed" Henderson. (*Id.*) Louis noticed that Jones had blood on his shoes and the front part of his pants. (*Id.*) Jones was wearing orange shoes, orange pants, and a matching colorful shirt. (*Id.*)

Early the next morning, Jones woke Louis and stated that he "had something he needed to do." (*Id.* at 51a.) Louis followed Jones into the basement and saw Jones place his orange shoes and pants from the night before into a paper bag. Both items were stained with blood. (*Id.*) The men walked to Pro-Clean Dry Cleaners. In the parking lot, Jones placed the shoes into the dumpster, explaining that he "couldn't get the stains out last night." (*Id.* at 51a-52a.) Jones left his orange pants with the dry cleaner. (*Id.* at 52a.)

On October 25, 2000, the state court denied Perkins's motion for relief from judgment. (Dist. Ct. Record 8-3, pp. 29-31.)

D. Perkins Attempts To Gather Additional Evidence And To Obtain Legal Assistance.

Following the denial of his state motion in late 2000 until his federal habeas filing in 2008, Perkins sought additional proof of innocence. He faced "numerous hurdles." (JA 123.) Perkins's education ended with a G.E.D., (Dist. Ct. Record 4, p. 1), he was in prison, and he was a "pro se litigant by necessity and lack of choice." (JA 123.) Nonetheless, Perkins sought additional support "to continue the pursuit of his actual innocence." (*Id.* at 125.)

First, with his sister's help, Perkins continued his efforts to locate the dry-cleaning clerk who received Jones's bloody clothes years earlier. Complicating matters was the fact that the clerk had retired. (JA 118.) Following "years of independent research," (JA 124), on July 16, 2002, Perkins and his sister obtained an affidavit from Linda Fleming, a retired clerk from Pro-Clean Dry Cleaners. According to Fleming, she was working on or around March 4, 1993, and was approached by a customer matching Jones's description. (Pet. App. 48a.) The customer wanted to know if Fleming could do anything to remove blood stains, and presented her with a pair of blood-stained orange pants. (*Id.*) The customer also presented a multi-colored cocktail shirt with large amounts of blood on the front bottom. (*Id.* at 48a-49a.) When Fleming asked about the blood, the customer stated he had been in a fight. (*Id.* at 49a.)

Next, Perkins had to re-acquire most of his legal records, which had been lost as a result of a flood and prison riot in 2001. (JA 124; Dist. Ct. Record 8-3, p. 11.) In 2004, Perkins repeatedly requested a copy of the police report associated with his case. (Dist. Ct.

Record 8-3, pp. 6-8, 10, 12, 13-17.) That year, Perkins also asked for records from the trial court. (*Id.* at pp. 9-10, 13-17.) In 2006, Perkins wrote to his trial attorney to secure records contained in his file. The attorney, no longer in private practice, did not maintain files for more than ten years. (*Id.* at 3.)

Perkins also sought legal "assistance to aid him in the filing of his habeas petition" in his effort to prove his innocence. (JA 124.) In 2001 and 2002, Perkins wrote several attorneys to secure counsel; none could help. (Dist. Ct. Record 8-3, pp. 33-35, 42-44, 46-47, 49-50.) He also contacted agencies that work with prisoners seeking to prove their innocence, but did not secure assistance. (*Id.* at 36, 45.) Without counsel, Perkins tried to prepare a legal case, but did not have access to a law library from 2001 to 2006. (*Id.* at 37-38.) And while he was approved to receive help from an in-prison legal writer in 2002 (*id.* at 41), in the years that followed the help was spotty at best. (*Id.* at 37-39, 62-68.)

In short, Perkins did not at any time "abdicate[] his quest to prove his innocence[.]" (JA 125.) Rather, he took repeated steps for preparing a thorough federal habeas petition.

E. The District Court's Decision

Ultimately, Perkins filed a *pro se* habeas petition with the United States District Court for the Western District of Michigan on June 13, 2008. (Dist. Ct. Record 1.) He filed an amended petition on August 29, 2008. (Dist. Ct. Records 6 through 6-5.) He asserted that he was entitled to habeas relief based on the same grounds asserted in his state proceedings, including his claim of ineffective assistance of counsel. (*See id.*)

Acknowledging that his conviction became final more than a year before his filing, Perkins asserted that his untimeliness should be excused because he is actually innocent. (Dist. Ct. Record 6-2, pp. 15-25.) He relied on the new evidence in the Hudson, Lewis, and Fleming affidavits. (Dist. Ct. Record 6, pp. 16-18; Dist. Ct. R. 6-2, pp. 5, 12.) Nevertheless, in the Report and Recommendation, the magistrate judge found that the petition was barred both by AEDPA's limitations period and by his lack of diligence. (Pet. App. 34a-40a.)

Perkins objected based on his showing of innocence, citing the affidavits as evidence not presented at trial, (JA 115-132), and asked the district court to excuse his untimeliness to avoid a "miscarriage of justice." (*Id.* at 126.) He explained that "he acted with reasonable diligence during the period he seeks to toll, to the best of his ability." (*Id.*) The district court found that Perkins was not entitled to relief because he had not been diligent. (Pet. App. 31a.) According to the district court, "[b]y July 2002, Petitioner had acquired all of the evidence that he recites to support his actual innocence, yet he waited until June 2008 to bring his claim before any court." (*Id.*) The court also found that Perkins's evidence of innocence was "substantially available to him at trial." (*Id.*) Acknowledging that the "precise contours of the affidavits may have been new as of 1997, 1999, and 2002," the court found that the evidence was not "new" because "one theory of the defense at trial was that Petitioner was being framed by the prosecution's lead witness [Jones], who himself was responsible for the murder." (*Id.*)

F. The Sixth Circuit's Reversal

After issuing a certificate of appealability asking whether "'reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling,'" (JA 133-136), the Sixth Circuit unanimously answered that question in the negative, reversing the district court and remanding to determine "whether Perkins asserts a credible claim of actual innocence." (Pet. App. 21a.)

Where a petitioner can satisfy the familiar *Schlup* standard, the Sixth Circuit reaffirmed that the petitioner may "pass through the [actual-innocence] gateway and argue the merits of his underlying constitutional claims.'" (Pet. App. 8a (quoting *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005)).) For this narrow range of cases, the court explained, diligence is not a prerequisite, "[g]iven the Supreme Court's rich jurisprudence protecting the rights of the wrongfully incarcerated" and the miscarriage of justice that could result from the imposition of procedural limits. Actual innocence, the court emphasized, distinguishes this case from those where petitioners seek relief "because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons." (Pet. App. 21a.)

The Sixth Circuit characterized the miscarriage of justice exception as a type of equitable tolling based on its earlier precedent, but recognized that it may more properly be described as an equitable exception to help "distinguish[] among different standards for equitable relief." (Pet. App. 20a n.3); *see Rivas*, 687 F.3d at 547 n.42; *Lee*, 653 F.3d at 932 n.5 ("The more accurate characterization is 'equitable exception,' because equitable tolling involves different theoretical

underpinnings."). Perkins thus refers to it by its traditional name—the equitable "miscarriage of justice" exception.

SUMMARY OF ARGUMENT

I. Habeas corpus traditionally placed few limits on a federal court's review of constitutional claims on their merits. Neither res judicata nor a statute of limitations applied. Over time, the Court and Congress created stricter limits on pursuing habeas relief, balancing concerns for finality, comity, and federalism against the equitable flexibility necessary to ensure injustices were remedied. This evolution led to *both* general rules limiting the writ *and* exceptions to those rules permitting relief in exceptional cases.

This case involves one traditional exception—the "miscarriage of justice" exception. That exception permitted courts to consider procedurally barred claims if a petitioner could show that no reasonable juror would have convicted him in light of new evidence. If a petitioner could meet this standard, it permitted review of the petitioner's claims whether or not the petitioner had been diligent. The exception applied to nearly every type of procedural default, including "successive" petitions that contained previously rejected claims; "abusive" petitions that presented new claims that could have been presented earlier; the failure of a petitioner to develop evidence in state court; and the failure of a petitioner to follow proper procedure when presenting claims in state court, including the failure to file for state habeas relief within the state's statute of limitations.

II. AEDPA's 1-year limitations period incorporates the miscarriage of justice exception.

A. The reasons that *Holland* gave for applying equitable tolling to AEDPA's limitations period show that the statute includes the miscarriage of justice exception. *Holland* relied on the presumption that a non-jurisdictional limitations period, like AEDPA's, incorporates equitable tolling. This background presumption, moreover, does not apply simply to equitable tolling but includes other established equitable standards. Indeed, *Holland* itself noted that statutes are construed to retain courts' traditional equitable authority absent the clearest command.

The miscarriage of justice exception falls within this presumption. Before AEDPA, the exception was "well-defined in the case law" and "familiar to federal courts." The exception thus applies to the limitations period absent the clearest command. And the limitations period no more "clearly" rejects the miscarriage of justice exception than it does equitable tolling. If anything, this case is easier. For the "ultimate equity" on the petitioner's side is a colorable claim of innocence, not the facts necessary for equitable tolling.

B. This conclusion is confirmed by (1) AEDPA's structure; (2) the legal backdrop against which it was enacted; and (3) its general purposes.

1. When read as a whole, AEDPA illustrates that its limitations period incorporates the miscarriage of justice exception. That is because Congress expressly departed from the exception in two separate areas. For both second petitions and evidentiary hearings, Congress raised the exception's bar—requiring both clear-and-convincing evidence of innocence and due diligence. These two provisions show that had Congress sought to reject the exception for AEDPA's limitations period, it would have done so expressly. A

contrary interpretation would mean that Congress took the radical step of eliminating the exception from the limitations period—even for *first* petitions—while merely adjusting the exception for *second* petitions. But the Court has long treated the dismissal of the first petition as a "particularly serious matter."

2. Two principles predating AEDPA support this result. For one thing, the Court has long applied similar procedural bars in a consistent fashion. As such, it has held that courts may raise AEDPA's limitations period *sua sponte* because it would make "scant sense" to interpret the limitations period differently from other procedural thresholds. It would make equally scant sense to interpret AEDPA's limitation period to exclude the miscarriage of justice exception because the exception applies to these other procedural obstacles. For another, the Court has long "filled in the gaps" in the habeas statutes with equitable principles. This gap-filling role has led the Court to retain the exception despite changes to those statutes limiting the writ.

3. The miscarriage of justice exception comports with AEDPA's purposes. While AEDPA sought to eliminate delay, the exception does not defeat that goal given its demanding nature. AEDPA also sought to harmonize its new requirements with traditional principles, and the writ's central purpose reaches its zenith in the context of actual innocence. Further, without the exception, AEDPA's efficiency purposes could be undermined, because petitioners would be incentivized to file unripe actual-innocence claims before their investigations are complete. The exception also promotes federalism by giving the same respect to the federal statute of limitations that

is given to similar state statutes. Finally, that the Court has repeatedly applied the exception after AEDPA confirms that it comports with the statute.

III. The State's contrary arguments lack merit. *First*, *Holland* has already rejected the State's textual argument that equitable exceptions would render superfluous the limitation period's "carefully scripted scheme." As *Holland* noted, the statute's text contains *triggers* for the limitations period, saying nothing about *exceptions*.

Second, the State's concerns for gamesmanship—that petitioners will sit on their evidence until the State's case has deteriorated—are overblown. The exception will not incentivize such gamesmanship because it sets *demanding* standards and provides *limited* relief—so it would be irrational for petitioners to take the risks that the State suggests. The exception's standards, moreover, minimize such incentives because unexplained delay can be held against the petitioner when determining whether the petitioner has met the exception's standards.

Third, the State misreads history in arguing that there is no traditional rule allowing habeas petitioners to present constitutional claims without time limits. Historically, *all* habeas petitioners (not just those with actual-innocence evidence) could wait indefinitely, as no statute of limitations applied to constitutional claims in habeas. The State's cases, by contrast, address different claims—*freestanding* claims of innocence based *solely* on new evidence without *any* constitutional error.

Fourth, the State is wrong to argue that the exception includes a diligence component. Diligence was a component of a separate method for excusing

procedural default—establishing cause and prejudice. The miscarriage of justice exception, by contrast, comes into play only when a petitioner cannot establish cause. The Court has already made this clear by noting that AEDPA's standards for second petitions are more rigorous than the miscarriage of justice exception because they include a diligence component.

Fifth, the State fails adequately to distinguish this Court's cases recognizing the miscarriage of justice exception. It argues that the exception was an equitable exception to an equitable rule created by this Court. But the Court also applied it to limits created by Congress, and, regardless, statutes in equitable areas are interpreted to retain equitable standards.

Sixth, the State argues that Michigan provides two remedies for petitioners who can establish their innocence—the ability to file a motion for relief from judgment and clemency. But these additional state remedies for those with freestanding claims of innocence have never sufficed to bar the procedural use of that actual-innocence evidence to permit review of constitutional claims.

ARGUMENT

I. THE MISCARRIAGE OF JUSTICE EXCEPTION HAS LONG ACTED AS A "GATEWAY" ELIMINATING PROCEDURAL OBSTACLES TO A FEDERAL COURT'S REVIEW OF A HABEAS PETITION ON ITS MERITS

A. Statutory And Judicial Limits On the Writ Evolved With Time And Habeas Practice

"[H]abeas corpus is, at its core, an equitable remedy." *Schlup*, 513 U.S. at 319. Thus, the "history of

the Great Writ of Habeas Corpus reveals" that federal courts traditionally applied "comparatively simple rules" when resolving habeas petitions, rules that did not impose many procedural limits to the resolution of the petition on its merits. *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996); *Hensley v. Mun. Ct.*, 411 U.S. 345, 350 (1973) (noting "demand for speed, flexibility, and simplicity"). For instance, unlike in most legal areas, "the denial by a court or judge of an application for habeas corpus was not res judicata," meaning that a "'person detained in custody might thus proceed from court to court until he obtained his liberty.'" *Sanders v. United States*, 373 U.S. 1, 7 (1963) (citation omitted). Similarly, federal courts had broad discretion to "receive evidence and try the facts anew." *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). There was also "no statute of limitations," and the "doctrine of laches [was] inapplicable." *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring). In short, the writ "cut through barriers of form and procedural mazes" to "reach all manner of illegal detention." *Harris*, 394 U.S. at 290.

Gradually, "Congress, the [Habeas] Rule writers, and the courts . . . developed more complex procedural principles" for habeas petitions. *Lonchar*, 517 U.S. at 322. Congress adopted stricter statutes and rules. *See McCleskey*, 499 U.S. at 483-88. The Court, for its part, attempted to fill "gaps in the habeas statute[s]" with equitable principles that balanced the competing demands in this area. *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (citing examples). Habeas limits have thus resulted from an "interplay between statu-

tory language and judicially managed equitable considerations." *Schlup*, 513 U.S. at 318 n.35.

These limits reflected a recognition that numerous "filings by individual petitioners might adversely affect the administration of justice" and "pose[] a threat to the finality of state-court judgments and to principles of comity and federalism." *Schlup*, 513 U.S. at 318; *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring in the result) (noting that "floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts"). The limits reflected the further reality that the writ's scope had expanded to reach claims alleging not only a lack of jurisdiction in the convicting court, but also all types of constitutional error. *See McCleskey*, 499 U.S. at 478-79.

Weighed against these practical concerns was the need "to maintain the courts' freedom to issue the writ, aptly described as the 'highest safeguard of liberty.'" *Lonchar*, 517 U.S. at 322 (citation omitted). Accordingly, these limits evolved in a manner that "balance[d] the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324. Along with the limits thus came exceptions designed to protect against the risk, aptly described by Justice Jackson, of "'prejudice [to] the occasional meritorious application [by] be[ing] buried in a flood of worthless ones.'" *McCleskey*, 499 U.S. at 492 (quoting *Brown*, 344 U.S. at 537 (Jackson, J., concurring in the result)); *see Engle v. Isaac*, 456 U.S. 107, 135 (1982) ("In appropriate cases th[e] principles [of comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration.").

B. Habeas Courts Have Long Recognized The Miscarriage Of Justice Exception

Today's case involves one traditional exception to procedural limits on the writ—the "fundamental miscarriage of justice exception." *Herrera*, 506 U.S. at 404. That exception has long been "'[w]ell defined in the case law,' and 'familiar to federal courts.'" *Calderon*, 523 U.S. at 559 (quoting *McCleskey*, 499 U.S. at 496). It "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U.S. at 404.

Under the exception, a court would consider a procedurally barred constitutional claim if a petitioner with new evidence could "show that it [was] more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327; *see Murray*, 477 U.S. at 496 (finding exception applies where "a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality op.) (finding exception applies for "a colorable claim of factual innocence"). This showing sufficed, "standing alone," to permit review of constitutional claims even if the petitioner had not been diligent. *See Withrow*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.).

The exception's settled acceptance reflects its proper balancing of the competing interests underlying the evolving habeas standards. On the one hand, the exception respected the interests in finality, comity, and conservation of resources, because "habeas corpus petitions that advance a substantial claim of

actual innocence are extremely rare." *Schlup*, 513 U.S. at 321. On the other, the exception furthered the writ's central purpose by "serv[ing] as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.'" *McCleskey*, 499 U.S. at 495 (citation omitted).

Before AEDPA, therefore, the Court repeatedly held that the exception applied to claims that were not properly presented to state courts (state defaults), and claims that were not properly presented to federal courts (federal defaults). Indeed, avoiding a miscarriage of justice has been "a unifying theme to this Court's habeas jurisprudence," with "the possibility that an error may have caused the conviction of an actually innocent person [being] sufficient by itself to permit plenary review . . . ." *Brecht*, 507 U.S. at 652 (O'Connor, J., dissenting). With respect to a statute of limitations specifically, it bears noting that "because there was no statute of limitations governing the filing of habeas-corpus petitions prior to AEDPA, there was likewise no occasion to apply the [exception] to excuse untimely filed petitions." *Rivas*, 687 F.3d at 547. Yet in every other context where the courts, Congress, or the states imposed procedural limits, the Court recognized the exception to those limits for miscarriages of justice—specifically, the imprisonment of one who credibly asserts innocence:

Successive Petitions. Based on statutorily imposed limits, the Court had held that courts were barred from considering "successive" petitions—those re-raising claims already rejected in federal court. *See Kuhlmann*, 477 U.S. at 449-52 (plurality op.). Relying on an article by Judge Friendly, however, the Court applied the miscarriage of justice exception to

this general rule, holding that courts should allow successive petitions if "the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454 (discussing Friendly, 38 U. Chi. L. Rev. 142).

Abusive Petitions. The Court had gradually placed stricter limits on "abusive" petitions—those raising new claims in a second petition that could have been raised in the first. *See Schlup*, 513 U.S. at 319 n.34. Ultimately, the Court held that courts could not consider these petitions unless a petitioner could show both "cause" for the failure to raise the claimed constitutional error earlier and "prejudice" from the error. *McCleskey*, 499 U.S. at 494. The Court again held, however, that even if a "petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 494-95.

Failure To Develop Facts In State Court. Similarly, the Court progressively placed stricter limits on the ability of petitioners to obtain federal hearings to supplement their constitutional claims. *See Keeney*, 504 U.S. at 4-7. It settled on the same "cause and prejudice" standard for evidentiary hearings when a petitioner failed diligently to develop facts in state court. *See id.* at 8. But again, the Court "adopt[ed] the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result . . . ." *Id.* at 11-12.

State Procedural Default. In a similar vein, the Court's jurisprudence evolved to apply stricter standards governing federal review of constitutional claims that state courts had rejected for failing to follow state procedure. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). As in other contexts, the Court ultimately required petitioners to show cause and prejudice for federal review of such claims. *See Coleman*, 501 U.S. at 750. Nevertheless, the Court retained the miscarriage of justice exception in this context too, noting "that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496; *see Coleman*, 501 U.S. at 750; *Smith v. Murray*, 477 U.S. 527, 537-38 (1986).

A variety of state defaults thus could be disregarded by a proper showing of innocence, including the failure to raise a claim on appeal, *see Murray*, 477 U.S. at 495; the failure to timely object under a contemporaneous-objection rule, *see Wainwright*, 433 U.S. at 87, and, particularly relevant here, the failure to timely file a petition or appeal, *see Coleman*, 501 U.S. at 750. In other words, "many states enforced their own statutes of limitations in their collateral review procedures . . . and the Supreme Court had held that a procedural default based on a failure to timely file for post-conviction relief in state court could be excused if the 'failure to consider the claims will result in a fundamental miscarriage of justice.'" *Rivas*, 687 F.3d at 550 (citation omitted). Indeed, numerous cases recognized that a credible claim of innocence could overcome the failure timely to file for

state post-conviction relief. *See, e.g., Morrow v. Thompson*, No. 96-35108, 1996 WL 740893, at *1 (9th Cir. Dec. 20, 1996); *Cokley v. Emery*, No. 96-1130, 1996 WL 718126, at *1 (10th Cir. Dec. 13, 1996); *Morales v. Calderon*, 85 F.3d 1387, 1389 (9th Cir. 1996); *Higgason v. Clark*, 984 F.2d 203, 206 (7th Cir. 1993); *Alexander v. Black*, No. 92-7320, 1993 WL 81855, at *2 (5th Cir. Mar. 8, 1993); *Gordon v. Nagle*, 2 F.3d 385, 388 (11th Cir. 1993); *Henderson v. Cohn*, 919 F.2d 1270, 1273 (7th Cir. 1990); *Whiddon v. Dugger*, 894 F.2d 1266, 1267-68 & n.2 (11th Cir. 1990).

Former Rule 9(a). In 1976, a "laches" doctrine was codified permitting a petition to be "dismissed if it appear[ed] that the state . . . ha[d] been prejudiced in its ability to respond to the petition by delay," and the petitioner could not show that the petition was "based on grounds of which he could not have had knowledge by the exercise of reasonable diligence." Rule 9(a) of the Rules Governing Section 2254 Cases, 28 U.S.C.A. fol. § 2254 (West 1994). Here again, courts recognized that the miscarriage of justice exception would overcome Rule 9(a). *See Spalding v. Aiken*, 460 U.S. 1093, 1097-98 (1983) (Burger, C.J., statement concerning denial of certiorari) (noting that exceptions to Rule 9(a) should include cases where petitioner can make "colorable claim of innocence"); *see also United States v. Stifel*, 594 F. Supp. 1525, 1539 n.13 (N.D. Ohio 1984) (rejecting Rule 9(a) argument because "defendant has presented a colorable claim of innocence"); 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 24.2(c), at 1286 (6th ed. 2011) (noting that under former Rule 9(a), "situations might arise—a 'manifest miscarriage of justice' or 'a colorable showing of inno-

cence,' for example—in which other recognized habeas corpus exceptions might excuse prejudicial delay").

Non-Constitutional Error. Finally, in the federal habeas context, the Court had held that habeas review was unavailable to correct non-constitutional errors. *See United States v. Addonizio*, 442 U.S. 178, 185 (1979). But the Court consistently excepted from this rule errors that "constituted 'a fundamental defect which inherently result[ed] in a complete miscarriage of justice.'" *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). And it found this exception met if an error resulted in a conviction "for an act that the law does not make criminal," i.e., where the petitioner was actually innocent. *Davis v. United States*, 417 U.S. 333, 346 (1974); *see Bousley v. United States*, 523 U.S. 614, 620 (1998).

In sum, before AEDPA, the Court had "consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice" to procedural limits on constitutional claims in a federal habeas petition. *Schlup*, 513 U.S. at 321.

II. AEDPA'S LIMITATIONS PERIOD INCORPORATES THE MISCARRIAGE OF JUSTICE EXCEPTION

AEDPA adopts a 1-year limitations period for petitions challenging state convictions. 28 U.S.C. § 2244(d)(1). This period is triggered by the latest of four dates: (A) "the date on which the judgment became final"; (B) the date on which any illegal state "impediment" to the filing of the petition was removed; (C) the date on which the Court recognizes a new and retroactive constitutional right; or (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through

the exercise of due diligence." *Id.* § 2244(d)(1). The statute expressly tolls this period during the time that "a properly filed application for State post-conviction" relief is pending in state court. *Id.* § 2244(d)(2).

The statute is silent, however, on whether Congress meant to incorporate traditional equitable exceptions, such as equitable tolling or the miscarriage of justice exception. In *Holland*, the Court held that AEDPA's limitations period incorporated equitable tolling. 130 S. Ct. at 2560-62. Here, the Court should likewise hold that the statute incorporates the miscarriage of justice exception. *Holland* supports that result. *See infra* Part II.A. So too do AEDPA's structure, the legal backdrop against which it was enacted, and its purposes. *See infra* Part II.B.

A. *Holland* Illustrates That AEDPA's Limitations Period Incorporates The Miscarriage Of Justice Exception

All of the reasons *Holland* gave for recognizing equitable tolling under § 2244(d)(1) confirm that this limitations period incorporates the miscarriage of justice exception.

1. As *Holland* noted, AEDPA's limitations period is not jurisdictional, so the principle that courts have "no authority to create equitable exceptions" to jurisdictional commands does not apply here. *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *see Holland*, 130 S. Ct. at 2560. Rather, the opposite presumption governs: a "nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 130 S. Ct. at 2560 (quoting *Irwin v. Dep't of Veterans Af-*

fairs, 498 U.S. 89, 95-96 (1990)); *see Young v. United States*, 535 U.S. 43, 49 (2002) (citing cases).

This presumption, moreover, is not limited to the specific equitable-tolling test that *Holland* adopted. Instead, it reaches well-established equitable standards. For example, after ruling that Title VII's timely filing requirement was not jurisdictional, the Court held that it was subject *both* to equitable tolling *and* to waiver and estoppel. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also, e.g., United States v. Locke*, 471 U.S. 84, 94 n.10 (1985) (noting that "[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling"); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 233-35 (1959) (interpreting federal statute of limitations to include estoppel defense). Likewise, "[f]raudulent concealment is an 'equitable doctrine . . . read into every federal statute of limitation.'" *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 178 (4th Cir. 2007) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

Holland itself recognized that this presumption applies more broadly than to equitable tolling. As the Court indicated, in areas where "equitable principles have traditionally governed," it has refused to "construe a statute to displace courts' *traditional equitable authority* absent the clearest command." 130 S. Ct. at 2560 (emphasis added; internal citations and quotation marks omitted). As *Holland* also noted, *see id.*, the Court has repeatedly "reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles,'" *Kuhlmann*, 477 U.S. at 447 (plurality op.) (citation omitted); *cf. Young*, 535 U.S. at 50 (finding background presump-

tion particularly appropriate for bankruptcy laws, because bankruptcy courts "are courts of equity"). *Holland* found that this equitable tradition "counsel[ed] hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." 130 S. Ct. at 2562.

In sum, as Judge Cabranes noted, the background presumption relied on in "*Holland* is not limited to equitable tolling," but reaches other traditional equitable claims. *Rivas*, 687 F.3d at 549.

2. The miscarriage of justice exception falls within this presumption. Before AEDPA, that exception was a well-established defense to many procedural defaults. *See supra* Part I. It was "'[w]ell defined in the case law'" and "'familiar to federal courts.'" *Calderon*, 523 U.S. at 539 (quoting *McCleskey*, 499 U.S. at 496); *see Schlup*, 513 U.S. at 320; *Herrera*, 506 U.S. at 404; *Keeney*, 504 U.S. at 11-12; *Coleman*, 501 U.S. at 750; *McCleskey*, 499 U.S. at 494-495; *Kuhlmann*, 477 U.S. at 454 (plurality op.); *Murray*, 477 U.S. at 496; *Smith*, 477 U.S. at 537; *Davis*, 417 U.S. at 346. Indeed, the exception's pedigree led Justice O'Connor to state that "this Court continuously has recognized that the ultimate equity on the prisoner's side—a sufficient showing of actual innocence—is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim." *Withrow*, 507 U.S. at 700. As this settled line of cases reflects, "absent the clearest command," AEDPA's limitations period incorporates this equitable principle. *Holland*, 130 S. Ct. at 2560 (internal quotation marks omitted).

No such clear command exists. Just as AEDPA's limitations period lacks unambiguous clarity to show congressional intent to reject equitable tolling, *see id.* at 2560-61, it likewise lacks unambiguous clarity to show a congressional rejection of the miscarriage of justice exception. Rather, "AEDPA's 1-year limit reads like an ordinary, run-of-the-mill statute of limitations" that incorporates traditional equitable defenses like equitable tolling, estoppel, and, in habeas, the miscarriage of justice exception. *Id.* at 2561.

If anything, today's case is easier than *Holland.* Notably, AEDPA's limitation period does expressly include one type of tolling—when a state post-conviction petition is pending in state court, *see* 28 U.S.C. § 2244(d)(2). By negative implication, the inclusion of that tolling provision could suggest that Congress did not mean to include other types of tolling (such as equitable tolling). *But see* 130 S. Ct. at 2562 (rejecting "the interpretive maxim *inclusio unius est exclusio alterius*"). AEDPA's limitations period, by contrast, makes no reference to an exception for other kinds of "miscarriages of justice." *Holland*, moreover, concerned an exception based on misconduct by the petitioner's attorney. *See id.* at 2564-65. Today's case, by contrast, concerns an exception for innocence. Surely "the 'evils of archaic rigidity'" that *Holland* described as resulting from "absolute legal rules," *id.* at 2563 (citation omitted), are far more severe when such rigidity could compel a factually innocent man to remain in prison for life—or, even worse, be put to death.

It should come as no surprise, therefore, that, after *Holland*, the five circuits (Second, Sixth, Ninth, Tenth and Eleventh) to consider the issue have found

that AEDPA's limitations period incorporates the exception. (Pet. App. 8a-20a); *see Rivas*, 687 F.3d at 547-52; *Lee*, 653 F.3d at 932-36; *San Martin*, 633 F.3d at 1267-68; *Lopez*, 628 F.3d at 1231. One other circuit, the Fifth, has suggested after *Holland* that no exception exists. *See Henderson v. Thaler*, 626 F.3d 773, 781 (5th Cir. 2010). But, as the Sixth Circuit noted, Pet. App. 12a n.1, that case addressed a different question—whether an equitable exception existed for a claim of innocence of the death penalty, not an assertion (like the one at issue here) of factual innocence of the crime. *Henderson*, 626 F.3d at 781.

B. Additional Considerations Confirm That AEDPA's Limitations Period Incorporates The Miscarriage Of Justice Exception

In addition to *Holland*, general principles prove that AEDPA's limitations period incorporates the miscarriage of justice exception. In particular, that interpretation is confirmed by (1) AEDPA's structure; (2) the legal backdrop against which it was enacted; and (3) its general purposes.

1. AEDPA's structure shows that Congress knows how to depart from the miscarriage of justice exception

AEDPA—when read "as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)—shows that the miscarriage of justice exception applies to its limitations period. As the Court has explained, *House*, 547 U.S. at 539, AEDPA did, in fact, depart from that exception in two legal areas where this Court had traditionally applied it. That "'Congress knows how to' restrict the traditional [exception] 'when it wants to,'" *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 417 (2009) (quoting *Omni Capital Int'l, Ltd. v. Rudolf*

Wolff & Co., 484 U.S. 97, 106 (1987)), proves that it did not intend to do so for the limitations period.

As explained, before 1996, the Court had applied the exception to require federal courts to consider an "abusive" petition. *McCleskey*, 499 U.S. at 494. AEDPA, by contrast, establishes a higher standard for those successive petitions. Petitioners must *both* meet a higher "clear and convincing evidence" standard of innocence *and* satisfy a diligence requirement. 28 U.S.C. § 2244(b)(2)(B)(i)-(ii).

Likewise, before 1996 in both the first and second habeas settings, the Court had applied the exception to permit petitioners to obtain evidentiary hearings that would have been barred for failure diligently to develop the facts in state court. *See Keeney*, 504 U.S. at 11. In AEDPA, however, Congress again "raised the bar" for such hearings. *Williams v. Taylor*, 529 U.S. 420, 433 (2000). It established the same requirements for evidentiary hearings—clear-and-convincing evidence of innocence and due diligence—that it established for abusive petitions, "eliminating [the] freestanding 'miscarriage of justice' exception." *Id.*; 28 U.S.C. § 2254(e)(2).

These provisions demonstrate Congress's detailed attention to, and ability to amend, the miscarriage of justice exception through AEDPA. It also reveals Congress's intent to leave the exception in place for untimely petitions. Neither provision "addresses the type of petition at issue here—a first federal habeas petition seeking consideration of [untimely] claims based on a showing of actual innocence." *House*, 547 U.S. at 539. Instead, Congress was silent on whether the exception would apply to such petitions. These other provisions show, however, that, had Congress

sought to prohibit courts from incorporating the exception into AEDPA's limitations period, it would have done so expressly, as it did elsewhere. *Cf. Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms").

This interpretation of silence comports with the traditional canon that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Nken v. Holder*, 556 U.S. 418, 430 (2009) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)) (refusing to interpret law as departing from traditional equitable standard governing stays). That Congress did not "raise[] the bar" for AEDPA's limitations period shows that, just as with equitable tolling, it meant for established rules to apply. *Williams*, 529 U.S. at 433; *see House*, 547 U.S. at 539 (refusing to extend more stringent AEDPA provisions to other procedural defaults). Put another way, the "more stringent actual innocence exception for successive petitions and evidentiary hearings," combined with the absence of more stringent standards for § 2244(d)(1), "suggests that Congress intended not to alter the existing jurisprudential framework." *Lee*, 653 F.3d at 937; *Souter*, 395 F.3d at 599.

Given this structure, moreover, the contrary interpretation would be "'seemingly perverse.'" *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) (citation omitted). It would mean that Congress took the radical step of eliminating the exception from the limita-

tions period—even for *first* petitions—while merely adjusting the exception for second petitions. That makes little sense. After all, it is the "[d]ismissal of a *first* [federal] habeas petition," not the second, that "is [the] particularly serious matter." *Lonchar*, 517 U.S. at 324; *House*, 547 U.S. at 539. Such an odd incongruity should not be grounded in silence alone. *See Rivas*, 687 F.3d at 550 ("'[I]t is difficult to imagine that a Congress that explicitly allowed maintenance of a second or successive petition where the applicant makes out a strong claim of actual innocence implicitly intended to foreclose as untimely an initial petition brought by the individual with a comparable claim.'" (citation omitted)); *cf. Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (rejecting interpretation that "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review").

2. The legal principles against which Congress enacted AEDPA show that the miscarriage of justice exception applies to its limitations period

That § 2244(d)(1) incorporates the miscarriage of justice exception is supported by the assumption "that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010); *see North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("'[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them'" (citation omitted)). Settled principles confirm that Congress

would not have departed from the miscarriage of justice exception through statutory silence.

a. The Court treats analogous procedural obstacles consistently

Before AEDPA, the Court had attempted to "advance[] uniformity in the law of habeas corpus" by interpreting and applying similar procedural obstacles to full habeas review in a similar fashion. *Keeney*, 504 U.S. at 10. The Court, for example, adopted the cause-and-prejudice standard for federal abusive petitions precisely because that standard governed state defaults. *McCleskey*, 499 U.S. at 496 (noting "the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ"); *see Keeney*, 504 U.S. at 6-10 (extending cause-and-prejudice standard to federal evidentiary hearings for same reasons). Congress, it should be presumed, was aware of these efforts to administer similar procedural rules in a consistent manner. *Merck*, 130 S. Ct. at 1795.

Indeed, the Court has already applied this very presumption when interpreting AEDPA's limitations period—presuming that threshold procedural obstacles to habeas review should be applied in a consistent manner. In *Day*, the Court interpreted the limitations period to give federal courts discretion to consider the timeliness of habeas petitions on their own initiative. 547 U.S. at 209. The Court did so because of the established law (preexisting AEDPA) that courts could *sua sponte* consider threshold obstacles to review. *Id.* at 206-09. And the Court found that it "would make 'scant sense' to treat AEDPA's statute of limitations differently from [these] other threshold constraints on federal habeas petitioners."

Wood, 132 S. Ct. at 1833 (quoting *Day*, 547 U.S. at 209).

Day confirms that AEDPA's limitations period includes the miscarriage of justice exception. As described in Part I, before 1996, federal courts had applied the exception to many threshold obstacles to habeas review, including both procedural defaults in state court and defaults that occurred because the petitioner failed properly to present claims on federal habeas. It would make "'scant sense' to treat AEDPA's statute of limitations differently" from these threshold constraints for the miscarriage of justice exception as well. *Wood*, 132 S. Ct. at 1833 (citation omitted). That would mean, on the one hand, that a federal court could review federal claims if the petitioner presented compelling evidence of actual innocence, even though state courts had rejected the same claims under the state's statute of limitations. *See, e.g.*, *Coleman*, 501 U.S. at 750 (noting that exception would apply to claims rejected in state court on timeliness grounds). If, on the other hand, a petitioner with the exact same claims and the exact same evidence properly exhausted his claims in state court but failed to file a timely federal petition, the federal court would be barred from considering those claims. Absent express language to the contrary, the Court should avoid an interpretation that would lead to such inequitable inconsistencies between petitioners. *See Panetti*, 551 U.S. at 945 (noting that "the practical effects of [the Court's] holdings[] should be considered when interpreting AEDPA").

If anything, the legal principle that procedural constraints should be interpreted and administered in a similar fashion applies more forcefully in this

case than it did in *Day*. There, the Court's holding that courts could raise AEDPA's statute-of-limitations defense on their own initiative *conflicted* with the presumption that statutes of limitations can be forfeited. *See* 547 U.S. at 212 (Scalia, J., dissenting); Fed. R. Civ. P. 8(c)(1). Here, by contrast, treating AEDPA's limitations period in harmony with other threshold obstacles to federal review *reinforces* the presumption that statutes do not "displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (internal citations and quotation marks omitted).

b. The Court "fills the gaps" of the habeas statutes

Before AEDPA, moreover, "[t]his Court ha[d] repeatedly noted the interplay between statutory language and judicially managed equitable considerations" when interpreting habeas statutes. *Schlup*, 513 U.S. at 318 n.35; *O'Neal*, 513 U.S. at 445. The Court's historical practice of "filling in gaps" in the habeas statutes confirms that if Congress had intended to displace one such "gap filler" (the miscarriage of justice exception), it would have done so in unmistakable terms. Indeed, the exception's very history illustrates the Court's refusal to eliminate it absent an *explicit* command to that effect.

The exception grew out of language from a 1948 statute indicating that a federal court need not entertain a "successive" petition if it was satisfied that "'the ends of justice will not be served by such inquiry.'" *Sanders*, 373 U.S. at 11 n.5 (quoting 28 U.S.C. § 2244). Since then, the Court has consistently interpreted habeas statutes as retaining this "equitable inquiry required by the ends of justice," so long

as no explicit language prohibited that inquiry. *Schlup*, 513 U.S. at 320. The 1948 version of § 2255, for example, "appeared to announce a much stricter abuse-of-the-writ standard than its counterpart in § 2244," but the Court held that "the language in § 2255 'cannot be taken literally,' and construed it to be the 'material equivalent'" of § 2244, thereby retaining its "ends of justice" standard. *McCleskey*, 499 U.S. at 484 (quoting *Sanders*, 373 U.S. at 13-14).

Subsequently, in 1966, Congress amended the habeas statutes "to introduce 'a greater degree of finality of judgments.'" *Kuhlmann*, 477 U.S. at 450 (plurality op.) (citation omitted). The amendments distinguished between petitions filed by federal and state prisoners, deleting the reference to the "ends of justice" for successive petitions by state prisoners. *Id.* at 449. Nevertheless, the Court rejected the argument that "federal courts no longer must consider the 'ends of justice' before dismissing a successive petition" by a state prisoner, *id.* at 451, finding that the "'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence," *id.* at 454 (citing Friendly, 38 U. Chi. L. Rev. at 160).

Ten years later, in 1976, Congress adopted a laches rule with former Habeas Rule 9(a). *See* 2 *Federal Habeas Corpus Practice* § 24. Here again, courts suggested that the rule should be interpreted to allow delayed claims to proceed on a showing of innocence. *Spalding*, 460 U.S. at 1094 (Burger, C.J., statement concerning the denial of certiorari); *see* 2 *Federal Habeas Corpus Practice* § 24.2[c], at 1286.

In short, before AEDPA, federal courts had interpreted habeas statutes as leaving room for judicial consideration of the "ends of justice" when determining whether federal or state procedural defaults should apply. That Congress was aware of this line of authority when enacting AEDPA, *see Merck*, 130 S. Ct. at 1795, confirms that, had it sought to prohibit courts from applying the miscarriage of justice exception to AEDPA's limitations period, it would have done so expressly.

3. The miscarriage of justice exception comports with AEDPA's purposes

The miscarriage of justice exception "comports with the values and purposes underlying AEDPA." *Calderon*, 523 U.S. at 558. To be sure, AEDPA's limitations period "seeks to eliminate delays in the federal habeas review process." *Holland*, 130 S. Ct. at 2562. But the exception has been carefully designed so as not to defeat that goal. It "is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327). As such, an exception for this "narrow class of cases" will not undermine the finality purposes of AEDPA's limitations period anymore than it has undermined the finality purposes of the other procedural rules to which it has applied. *McCleskey*, 499 U.S. at 494. If anything, *Holland*'s equitable-tolling test will apply far more frequently. *Schlup*, 513 U.S. at 324 ("[E]xperience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.").

AEDPA, moreover, "did not seek to end every possible delay at all costs" or "undermin[e] basic habeas corpus principles," but instead sought to "harmonize

the new statute with prior law, under which a petition's timeliness was always determined under equitable principles." *Holland*, 130 S. Ct. at 2562. Thus, "[w]hen Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). And the central purpose of habeas corpus—protecting individual liberty—reaches its zenith when the petitioner may be innocent. *Schlup*, 513 U.S. at 325 (noting that the "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system"); *see McCleskey*, 499 U.S. at 495.

In addition, the conclusion that AEDPA's limitations period does not incorporate the miscarriage of justice exception could hinder "judicial efficiency and conservation of judicial resources." *Day*, 547 U.S. at 205. After all, barring any consideration of late-filed actual-innocence claims would only incentivize habeas petitioners to file federal petitions within a year of *each and every* new piece of evidence, *see* 28 U.S.C. § 2244(d)(1)(D), even if the investigations into their innocence are not yet complete and the actual-innocence claims not yet ripe. In that respect, it should be noted that gathering actual-innocence evidence takes substantial time and resources. *See* Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 126 (2008) ("Locating an alibi witness, obtaining experts to challenge forensic evidence or undermine eyewitness identifications, or presenting evidence of defendants' lack of capacity requires substantial resources and time."). In the context of *Ford*-based incompetency claims, the Court has recognized that

"[i]nstructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, reduce piecemeal litigation, or streamline federal habeas proceedings." *Panetti*, 551 U.S. at 946 (internal quotation marks and alterations omitted). The same is undoubtedly true for unripe actual-innocence gateway claims.

Incorporating the miscarriage of justice exception into AEDPA's limitations period also comports with federalism principles. One such principle is comity, which the Court has honored by attempting to eliminate "inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." *Coleman*, 501 U.S. at 751. But eliminating the exception from AEDPA's limitation period would do the opposite. It would grant greater respect to a federal statute than is granted to a state statute, since a federal court may apply the exception to consider claims defaulted in state court under state timeliness rules. *See id.* at 750. It would be odd to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of *federal* procedural rules than with the procedural rules established and enforced by the *states*. If anything, the federal statute of limitations should be interpreted less strictly than similar state rules. *See Holland*, 130 S. Ct. at 2563 (rejecting strict standard applied to state procedural defaults that criminal defendants bear the risk of attorney errors when applying equitable tolling to AEDPA's limitations period).

Confirming that the exception comports with AEDPA. the Court has repeatedly applied it after the statute's enactment. *See House*, 547 U.S. at 536-54;

Bousley, 523 U.S. at 622-24; *Calderon*, 523 U.S. at 558. In *Calderon*, the Court adopted the exception for determining when a federal court may recall its mandate to revisit the merits of an earlier decision. 523 U.S. at 558 (noting that the "miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence"). In *House*, the Court relied on the standard to overcome a petitioner's procedural default in state court. 547 U.S. at 538. And in *Bousley*, a federal case under § 2255, the Court found that the standard, if met, could be used to overcome a failure to raise a claim on direct federal appeal. 523 U.S. at 622. The exception is equally applicable in this habeas setting.

The constitutional-avoidance canon supports this reading. As courts have recognized, "denying federal habeas relief from an actually innocent [prisoner] would be 'constitutionally problematic.'" *Lee*, 653 F.3d at 936 (quoting *Souter*, 395 F.3d at 601-02 and citing the Suspension Clause); *see Rivas*, 687 F.3d at 552 (describing this possibility as raising a "thorny constitutional issue"). In *Herrera*, the Court assumed, "for the sake of argument," that a capital petitioner with a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution" of the petitioner "unconstitutional." *Herrera*, 506 U.S. at 417. Here, Perkins not only maintains his actual innocence, but also asserts constitutional violations at the trial resulting in his conviction, raising even deeper constitutional concerns. Allowing actually innocent prisoners access to habeas relief via the *Schlup* gateway thus stays "within AEDPA's framework, without necessitating the more

delicate task of determining whether § 2244(d) itself violates the Constitution when applied to deny review to a first-time petitioner raising a credible and compelling [assertion] of actual innocence along with claims of constitutional error." *Rivas*, 687 F.3d at 552.

III. THE STATE'S ARGUMENTS LACK MERIT

The State's arguments to the contrary do not require a different conclusion.

A. *Holland* Has Already Rejected The State's Textual Arguments

The State begins with § 2244(d)'s text. It argues that the statute "establishes a detailed system for determining when AEDPA's one-year limitations period begins to run" and that the miscarriage of justice exception would "render[] superfluous this carefully scripted scheme." Br. of Pet'r 17-18. This argument should look familiar. After all, in *Holland* the state argued the same thing. *See* Br. of Resp. at 26-27, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5327), 2010 WL 304276. But the State's rationale—the rationale of those pre-*Holland* decisions that refused to incorporate the miscarriage of justice exception, *see, e.g.*, *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (noting that § 2244(d)(1) defines "its one-year limitations period in detail and adopts very specific exceptions")—was expressly rejected by *Holland*. *See* 130 S. Ct. at 2561. There, the Court pointed out that § 2244(d)(1)'s detailed provisions "relat[e] to the events that *trigger* its running," and are not "'explicit exceptions to its basic time limits.'" *Id.* (citation omitted). Inclusion of these *triggers*, it followed, did not suffice to show that Congress intended for the

courts to reject traditional *exceptions* to statutes of limitations like equitable tolling. *See id.*

The same textual analysis applies here. Indeed, the appellate courts have consistently noted that *Holland's* textual interpretation applies with full force to the miscarriage of justice exception. *See, e.g., Rivas*, 687 F.3d at 551 (finding that circuit decisions that found no miscarriage of justice exception "rest[ed] on an error of statutory construction, which the Supreme Court itself identified in *Holland*").

Recognizing this flaw in its position, the State attempts to distinguish *Holland* by arguing that the miscarriage of justice exception (unlike equitable tolling) would make superfluous the triggering event in § 2244(d)(1)(D) for new evidence. Br. of Pet'r 17-18, 22-23 & n.2. That too is untrue. The miscarriage of justice exception can comfortably coexist with this triggering event. By its plain terms, § 2244(d)(1)(D) allows federal courts to reach the merits of habeas claims if the petitioner filed the petition in a year of the time within which new evidence could have been discovered through reasonable diligence. That is so *regardless whether* the new evidence has anything to do with the petitioner's guilt or innocence. *See, e.g., Wilson v. Beard*, 426 F.3d 653, 659-62 (3d Cir. 2005) (finding *Batson* claim timely based on new evidence of jury discrimination unrelated to petitioner's guilt).

The miscarriage of justice exception, by contrast, allows a federal court to reach the merits *only* if new evidence shows "that it is more likely than not that 'no reasonable juror' would have convicted [the petitioner]." *Schlup*, 513 U.S. at 329. Thus, § 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less

stringent (because it requires no showing of innocence) than the miscarriage of justice exception. Many petitions that could not possibly meet that exception will be timely under § 2244(d)(1)(D). That provision will not be rendered superfluous. *See Souter*, 395 F.3d at 600.

B. The State's Concerns For "Gamesmanship" Can Be Addressed In The Regular Course

The State next turns to "policy reasons," noting that the miscarriage of justice exception would encourage "gamesmanship" by allowing petitioners to sit on their actual-innocence evidence until the prosecution's evidence has deteriorated. Br. of Pet'r 18, 25. Setting aside the fact that "claims of actual innocence are rarely successful," *Schlup*, 513 U.S. at 324, meaning that only a handful of cases would even be affected by the exception, even for this limited range of cases, the State's policy concerns are overstated. They fall far short of demonstrating why the Court should abandon this traditional exception.

To begin with, nothing about the miscarriage of justice exception incentivizes petitioners to engage in purposeful delaying tactics. After all, even in those extraordinary cases that satisfy the exception's demanding standard, *House*, 547 U.S. at 538, the result is simply to permit petitioners a gateway to "proceed . . . with [their] procedurally defaulted constitutional claims," *id.* at 555. In other words, habeas petitioners must meet a demanding standard only to be able to do what they could have *otherwise* done had they filed timely claims. Since the exception *both* requires petitioners to meet stringent standards *and* grants only limited relief to the few who can pass through its

narrow gateway, it would simply be irrational to roll the dice in the manner that the State hypothesizes.

The standards that govern the exception further minimize such incentives for delay. The new evidence necessary for the miscarriage of justice exception is not considered in a vacuum. Rather, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327-28). Accordingly, evidence collected or presented by the State at trial would retain its full force at the *Schlup* stage, regardless of the time that has passed.

Likewise, the equitable nature of habeas proceedings enables federal courts to count unexplained delay against the petitioner. A court may "'consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.'" *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 332). Thus, even if there is a chance that an "elderly prosecution witness" might die during any delay (Br. of Pet'r 18), a petitioner could not avoid the effect of that witness's original testimony under this totality-of-the-evidence inquiry. The habeas court could, however, hold the unjustified delay *against the petitioner* when making credibility findings as to whether the exception has been met.

Nor would any such delay allow petitioners to prevent the prosecution from introducing a deceased witness's prior testimony—which would have been subject to cross-examination—at a new trial. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (recognizing exception to Confrontation Clause where

witness is unavailable and the defendant had a prior opportunity for cross-examination). Indeed, when this Court granted relief in *Vasquez v. Hillery*, 474 U.S. 254 (1986), it rejected similar arguments that considered the "difficulties that [the state] will face if forced to retry the defendant" twenty years after the original trial. *Id.* at 265. "As it turned out, by relying on the transcript of the earlier trial, the state was able to secure a second conviction." 2 *Federal Habeas Corpus Practice* § 24.2[b], at 1283 n.18.

The passage of time, moreover, is a double-edged sword. A petitioner's case for innocence itself can weaken over time, should one of petitioner's witnesses fall ill or become unavailable. Any delay by a petitioner runs this risk. It also runs the risk that one of the petitioner's witnesses loses his fortitude to testify in a contested hearing. On this point, it bears noting that because much of the petitioner's evidence (unlike the State's evidence) must, by definition, be "new," that evidence is not preserved in the same way as is the State's trial evidence.

And at all events, the State ignores that "generally, a prisoner's 'principal interest . . . is in obtaining *speedy* federal relief on his claims,'" because the prisoner must remain in prison until such relief is granted. *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (emphasis added; citation omitted). To the extent incentives for delay may exist in death-penalty cases, even there, "last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course." *Panetti*, 551 U.S. at 946; *cf.* Rule 4 of the Rules Governing § 2254 Cases (permitting district court to dismiss frivolous petition immediately).

Confirming that the State exaggerates its concerns, this Court has repeatedly applied the exception in many contexts. *See supra* Part I. The exception is just as much "a sound and workable means of channeling the discretion of federal habeas courts" in this context as it is in these others. *Calderon*, 523 U.S. at 559 (internal citation and quotation marks omitted). Indeed, despite years of applying the exception, *Schlup* agreed with "Judge Friendly's observation a quarter of a century ago that 'the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.'" 513 U.S. at 322-23 (quoting Friendly, 38 U. Chi. L. Rev. at 145).

Given all of this, the State's concern (and the concern of its *amici* States) over the imposition of "substantial costs on the criminal justice system" from innocence litigation appears deeply overblown. With few petitions presenting claims of actual innocence, let alone untimely claims of innocence, the universe of cases impacted by today's case is not large. Few of these cases, moreover, will overcome the high *Schlup* hurdle, further cabining the purported costs of this narrow range of cases. Perhaps that is why only a third of the states have raised this concern. It is also perhaps why the United States, which is equally impacted by today's case, *see* 28 U.S.C. § 2255(f), has not joined Michigan's effort to close the courthouse doors to inmates who may be actually innocent.

Finally, the State notably makes no allegation that the claims *in this case* were motivated by such delaying tactics. It has not identified a prosecution witness who has died in the interim. It has not identified an unfair tactical advantage somehow gained by Perkins. And it has made no argument that any

delay here turned on improper motives rather than Perkins's continued efforts to uncover additional actual-innocence evidence and to search for legal representation. *See supra* at 9-10.

C. The State's Historical Exegesis Discusses Irrelevant Legal Principles

The State next argues that the miscarriage of justice exception does not qualify as a background rule of equity that can be incorporated into AEDPA's limitations period, noting that "there is no equitable tradition of allowing defendants who claim actual innocence an indefinite period of time to file a constitutional claim based on new evidence." Br. of Pet'r 19. The State is flat wrong.

To begin with, the State ignores the numerous cases in which the Court did "reaffirm[] the existence and importance of the exception." *Schlup*, 513 U.S. at 321. When repeatedly noting that "[f]ederal courts retain the authority to issue the writ of habeas corpus in [this] narrow class of cases," *McCleskey*, 499 U.S. at 494, the Court never included an expiration date on a petitioner's ability to establish innocence. That is no doubt due to the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Schlup*, 513 U.S. at 325 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

Indeed, the State overlooks that our nation's equitable notions, reflected both in acts of Congress and decisions of our courts, generally granted *all* petitioners—not simply those claiming innocence—an *unlimited* time to file habeas petitions asserting constitutional claims. As noted, before AEDPA, there had

never been a statute of limitations for such federal habeas petitions. *See, e.g.*, *Vasquez*, 474 U.S. at 265. This history confirms not only the existence of these equitable notions, but also that AEDPA's limitations period should be interpreted narrowly—as a departure from a longstanding common-law rule. *See United States v. Texas*, 507 U.S. 529, 534 (1993).

The State, by contrast, refers to legal principles outside of habeas—such as Fed. R. Crim. P. 33 and analogous state rules—governing when a new trial may be granted based solely on claims of *newly discovered evidence*, not on claims of *constitutional error*. Br. of Pet'r 20-21. These cases are irrelevant. Petitioners who rely on the miscarriage of justice exception do not seek a new trial based on new evidence; they seek a new trial based on the constitutional claims that they have procedurally defaulted. *See House*, 547 U.S. at 555; *Sclup*, 513 U.S. at 315-16. Justice Jackson long ago noted the difference between these types of claims. When interpreting Fed. R. Crim. P. 33, he found that any miscarriages of justice from that rule's time limits for new trials was mitigated by habeas corpus, which "provide[d] a remedy for . . . *constitutional errors* at the trial *without limit of time*." *United States v. Smith*, 331 U.S. 469, 475 (1947) (emphases added).

It should be evident, then, that the State's historical argument conflates "freestanding claims of actual innocence" (in which newly discovered evidence provides the *sole* basis for relief) with "gateway" claims of actual innocence (in which constitutional error provides the grounds for relief). *See Schlup*, 513 U.S. at 313-17 (explaining differences between these claims); *Herrera*, 506 U.S. at 404 (same). This error

is confirmed by the State's reliance on *Herrera* and the authorities it discusses. *See* Br. of Pet'r 21-22. *Herrera* addressed whether the Constitution authorizes a freestanding claim of actual innocence for a trial free of constitutional error. 506 U.S. at 404. Whether or not there was any such traditional rule allowing for "substantive" actual-innocence claims to be asserted before AEDPA, *see Herrera*, 506 U.S. at 404, there unquestionably was a traditional rule allowing for "procedural, rather than substantive" assertions of actual innocence, *Schlup*, 513 U.S. at 314. It is those procedural assertions that matter here.

D. The State's Diligence Test Conflicts With The Miscarriage Of Justice Exception

The State falls back on the argument that any miscarriage of justice exception to AEDPA's limitations period must include a diligence element. Br. of Pet'r 28-29. The State is mistaken. The exception has never turned on diligence. Diligence, instead, is a component of the more common method for excusing default—cause and prejudice. *See McCleskey*, 499 U.S. at 498 (noting that "[t]he requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation"). That is why diligence is a factor under *Holland*'s equitable-tolling test, which bears similarities to the cause-and-prejudice standard. *See, e.g.*, *Lopez*, 628 F.3d at 1231 (noting that a petitioner "must demonstrate that he diligently pursued his federal claims as part of his showing of cause for the delay in filing"). The miscarriage of justice exception, by contrast, comes into play when a petitioner cannot establish cause. *McCleskey*, 499

U.S. at 494. It is, in other words, an "exception to cause." *Id.* at 495. *Rivas*, 687 F.3d at 547 n.42.

The Court's cases on the exception bear this out. For example, in *Calderon*, the Court described the "miscarriage of justice standard" as "somewhat more lenient than [AEDPA's] standard" for second petitions, because AEDPA actually included such a diligence element. 523 U.S. at 558 (citing 28 U.S.C. § 2244(b)(2)(B)(i)). And in *Keeney*, the Court adopted the miscarriage of justice exception for petitioners who failed *diligently* to develop the facts of their claims in state court; if the exception to this diligence standard itself had a diligence component, it would have rendered the exception a nullity. *See Williams*, 529 U.S. at 432-34 (describing "*Keeney*'s threshold standard of diligence"); *see also Withrow*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part) (a credible showing of innocence is "sufficient, *standing alone*, to . . . justify adjudication of the prisoner's constitutional claim" (emphasis added)). Thus, both before and after AEDPA, this Court has recognized that a sufficient showing of innocence, standing alone and without any inquiry into "cause" (or diligence), permits federal courts to reach the merits of defaulted claims—whether the default occurred in state court or in the course of federal litigation. Accordingly, the courts of appeals that have adopted the exception have refused to require any diligence element. *See Rivas*, 687 F.3d at 539, 547 n.42; Pet. App. 16a-20a; *Lee*, 653 F.3d at 934; *San Martin*, 633 F.3d at 1267-68; *Lopez*, 628 F.3d at 1230-31.

The State, by contrast, relies on *Irwin* and other non-habeas cases imposing a diligence requirement for equitable tolling. Br. of Pet'r 27. But this non-

habeas law does not involve a criminal conviction and prison time or the death penalty. Innocence is never at issue. In the habeas context, by contrast, it is innocence (not diligence) that is the "ultimate equity." *Withrow*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part).

It bears repeating that simply because diligence is not an element of the miscarriage of justice exception does not mean that it is irrelevant. Rather, as explained, unjustified delay may be a factor for determining whether a petitioner has made a sufficient showing of innocence. *See House*, 547 U.S. at 537; *Schlup*, 513 U.S. at 332.

E. The State Fails To Distinguish Cases Applying The Miscarriage Of Justice Exception

The State eventually acknowledges that adding a diligence element onto the miscarriage of justice exception would be a novel (and, as shown, self-defeating) graft, and the "three reasons" it offers why the Court should ignore the long "line of cases" applying that exception come up short. Br. of Pet'r 28-31.

First, the State argues that these cases have limited the use of the new evidence of innocence *only* to determining whether the petitioner has met the miscarriage of justice exception, and have not permitted the petitioner to then use the evidence to support the underlying constitutional claim. Br. of Pet'r 28-30. This argument is both mistaken and beside the point. None of the Court's cases describing the exception have said that the new evidence is limited to determining whether the exception is met. In *House*, for example, the Court gave no indication that the new evidence could not subsequently be used to establish

the petitioner's ineffective-assistance claim. 547 U.S. at 540-54. Thus, on remand, the district court held that counsel had been ineffective based on this new evidence. *See House v. Bell*, No. 3:96-cv-883, 2007 WL 4568444, at *8-*9 (E.D. Tenn. Dec. 20, 2007).

Regardless, the State's argument is irrelevant to the question presented. Whether or not new evidence relied on to establish a miscarriage of justice can be used to establish constitutional claims says absolutely nothing about whether AEDPA's limitations period incorporates the exception in the first place. And while Perkins, like the petitioner in *House*, may seek to use this evidence to establish his ineffective-assistance claim, Perkins also brings other constitutional claims that plainly will not rely on that evidence (e.g., claims concerning the jury instructions). (Dist. Ct. Records 6 through 6-5.)

Second, the State argues that its diligence requirement comports with "the *House* line of cases" because those cases concerned exceptions to procedural defaults and "did not address the diligent-pursuit requirement one way or the other." Br. of Pet'r 30-31. But, as noted, *see supra* Part III.D, no reasonable interpretation of these cases imposes a diligence requirement. *See Calderon*, 523 U.S. at 558.

Third, the State argues that this line of cases "involved an equitable exception to an equitable rule created by the Court itself," rather than a statutory rule like § 2244(d)(1) created by Congress. Br. of Pet'r 31. But the exception applied not simply to procedural defaults in state court; it also reached areas where Congress had drafted rules. In *Kuhlmann*, for example, "seven Members of this Court squarely re-

jected the argument that in light of the 1966 amendments [to the habeas statute limiting consideration of successive petitions], 'federal courts no longer must consider the "ends of justice" before dismissing a successive petition.'" *Schlup*, 513 U.S. at 320 (quoting *Kuhlmann*, 477 U.S. at 451 (plurality op.)).

In any event, even if the State were correct about the exception's reach, its argument would not lead to a different result. It would only mean that, as with equitable tolling, the exception falls within the presumption that Congress does not mean "to displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (internal citations and quotation marks omitted). Incorporating the miscarriage of justice exception creates no more "separation-of-powers implications," Br. of Pet'r 31, than does incorporating equitable tolling. For both situations, Congress has not drafted the limitations period with the unambiguous clarity necessary to displace traditional equitable rules.

F. The State's Alleged Remedies Say Nothing About Whether The Limitations Period Incorporates The Exception

Lastly, while nowhere suggesting that Perkins has not adequately exhausted his constitutional claims, the State argues that a miscarriage of justice exception is unnecessary because he has two remedies under state law to establish his innocence. Br. of Pet'r 31-33. This argument fares no better.

To begin with, the State seeks a broad interpretation of AEDPA's limitations period, arguing that it does not incorporate the miscarriage of justice exception in *all* cases. It fails to explain why the fact that a particular petitioner in a particular case allegedly

has additional state remedies should be a basis for such a broad rule. To the extent the State argues that the availability of the exception should somehow depend on the particular remedies available to the particular petitioner in the particular case, it would conflict with the Court's goal of "advanc[ing] uniformity in the law of habeas corpus," *Keeney*, 504 U.S. at 10, and "pose serious administrability concerns," *Gonzalez v. Thaler*, 132 S. Ct. 641, 655 (2012).

Regardless, the State's purported remedies do not bar application of the exception. Its reliance on Mich. Ct. R. 6.502(G)(2)—which allows a petitioner to "file a second or subsequent motion based on . . . a claim of new evidence that was not discovered before the first such motion"—again confuses a substantive actual-innocence claim with a procedural actual-innocence claim. Whether or not Perkins may now raise a *free-standing* actual-innocence claim in state court, the Court may still use the actual-innocence claim as a *gateway*. Indeed, in *House*, the State argued that Tennessee law permitted the petitioner to assert his innocence in state court, *see* Br. of Resp. at 45 & n.35, *House v. Bell*, 547 U.S. 518 (2006) (No. 04-8990), 2005 WL 3226400, but this Court still found that the actual-innocence claim allowed the petitioner to "proceed on remand with [his] procedurally defaulted constitutional claims," 547 U.S. at 555.

Nor would it make sense for Perkins to return to state court to pursue his constitutional claims. For one thing, he has already pursued those claims on direct appeal as well as through a post-judgment motion under Mich. Ct. R. 6.502(G), (Dist. Ct. Record 8-3, pp. 18-23), and Perkins likely cannot raise them again under state law. *See* Mich. Ct. R. 6.508(D)(2)

(barring court from granting relief on second motion raising "grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter" absent a change in law). For another thing, it is cold comfort to, as the State suggests, inform Perkins that his remedy is to seek further constitutional guidance from the court he believes to have deeply erred already.

The State also argues (at 32-33) that AEDPA's limitations period does not incorporate the miscarriage of justice exception because innocent petitioners may seek clemency. This argument would gut the exception. As the State concedes, Br. of Pet'r 32, "[c]lemency is deeply rooted in our Anglo-American tradition of law," *Herrera*, 506 U.S. at 412-13. Yet the availability of clemency to cure injustice has never stopped the Court from applying the miscarriage of justice exception to defaulted claims. *Compare House*, 547 U.S. at 536-54 (applying exception to Tennessee conviction); *Schlup*, 513 U.S. at 330-32 (applying exception to Missouri conviction), *with* Tenn. Code Ann. § 40-20-101 (granting clemency power); Mo. Const. art. IV, § 7 (same). In short, the existence of the miscarriage of justice exception has never turned on the unavailability of state remedies for actual-innocence claims. The Court should not interpret the exception any differently here.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case should be remanded to determine whether Perkins meets the standards for application of the miscarriage of justice exception.

Respectfully submitted,

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REPLY BRIEF

No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Perkins' entire theory of the case rests on the misconception that *Holland* v. *Florida*, 130 S. Ct. 2549 (2010), imported every equitable doctrine as an exception to AEDPA's statute of limitations. He argues that because the miscarriage-of-justice exception is a recognized equitable doctrine, it must apply here. But Perkins misapprehends *Holland*'s holding (which is limited to equitable tolling), the miscarriage-of-justice exception (which applies to court-created procedural bars—not federal statutes of limitation), and AEDPA itself (which occupies the field by providing a one-year filing window for all claims based on new evidence).

Holland turned on the fact that courts had applied equitable tolling as an exception to civil and criminal statutes of limitations for many years. The principle is so well-established that the Court *presumes* all non-jurisdictional federal statutes of limitation are subject to a rebuttable presumption in favor of equitable tolling; Congress must rebut that presumption in the statute's plain text to preclude such tolling. This Court in *Holland* concluded that nothing in AEDPA's text rebutted the presumption.

But pre-AEDPA, no court had ever grafted a miscarriage-of-justice exception onto any federal statute of limitations. Nor had any court put Congress on notice that if Congress failed to exclude the exception in the statutory text, courts would assume the exception applies. Thus, courts cannot presume Congress intended to incorporate the exception as a way to abrogate AEDPA's limitations period. A litigant must show Congress expressly *included* the exception.

Congress did incorporate the miscarriage-of-justice exception in two places in AEDPA. But Congress conspicuously declined to do so in § 2244. Instead, Congress reasonably created a one-year filing window following discovery of new evidence, whether or not the petitioner claims innocence. Thus, to apply the exception here, beyond that one year, would exceed the scope of the congressionally delegated habeas corpus power. *Ex parte Bollman*, 4 Cranch 75, 94 (1807) ("[T]he power to award the writ by any of the courts of the United States, must be given by written law."); *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some [habeas] cases, we are not free to rewrite the statute that Congress has enacted.").

Perkins also misapprehends Michigan's theory of the case. Michigan does not believe that AEDPA deprives an actually innocent defendant of an opportunity to advance a claim based on new evidence. A defendant who uncovers new evidence 50 years after state proceedings become final is entitled to file a habeas claim under § 2244(d)(1)(D) based on that new evidence. But AEDPA *does* require the defendant to come forward with that evidence within one year after discovery. A diligence requirement is consistent with equity, the states' interest in responding to claims based on new evidence while it is fresh, and Perkins' interest in having his claim adjudicated promptly.

The idea of keeping the filing window open indefinitely for those claiming innocence sounds virtuous. But doing so defeats the balance Congress created and invites abuses that will overwhelm and mask the few meritorious petitions in the system.

REPLY ARGUMENT

I. The Court should not write into AEDPA a miscarriage-of-justice exception that Congress rejected.

A. Congress controls the scope of the habeas writ.

This Court has unanimously "recognized that 'the power to award the [habeas] writ by any of the courts of the United States[ ] must be given by written law.'" *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) (quoting *Bollman*, 4 Cranch at 94). So while federal courts can clarify ambiguities in the habeas corpus statute, *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993), "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 518 U.S. at 651 (quoting *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996)).

"[T]he fact that the writ has been called an 'equitable' remedy [see Resp. Br. 17] does not authorize a court to ignore this body of [habeas] statutes, rules, and precedents." *Lonchar*, 517 U.S. at 323. "There is no such thing in the Law[ ] as Writs of Grace and Favour issuing from the Judges." *Id.* (quoting *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)).

As a result, subject to judicial power to clarify ambiguities, AEDPA specifies the limits of federal-court authority to grant habeas relief. "It is for Congress, not this Court, to amend the statute if it believes that [AEDPA] unduly restricts federal prisoners' ability" to file. *Dodd*, 545 U.S. at 359–60.

B. Section 2244(d)(1)(D)'s plain text excludes a miscarriage-of-justice exception to the one-year limitations period.

Section 2244(d) includes six paragraphs that define in great detail AEDPA's one-year limitations period for "a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). Congress considered the situation at issue here, where a state-court defendant belatedly discovers new evidence; determined that a constitutional claim based on such evidence should be heard if filed promptly; and specifically created a one-year window within which to file that claim, regardless of whether the defendant asserts innocence. § 2244(d)(1)(D).

Nowhere in § 2244(d) does Congress suggest the existence of an additional exception based on the miscarriage-of-justice doctrine. As this Court has affirmed in a variety of contexts, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (quotation omitted). And that observation carries even greater weight given that § 2244(d)(1)(D) addresses the exact situation presented here and opens a one-year filing window available to those claiming unfair trials, whether or not they assert innocence.

Tellingly, Congress did expressly incorporate the miscarriage-of-justice exception in other AEDPA sections. Just two subsections above § 2244(d), in a provision barring successive habeas petitions, Congress created an "innocence" exception based on new evidence for petitioners who acted diligently. 28 U.S.C. § 2244(b)(2)(B)(i)–(ii).

Several sections later, Congress did it again. In a provision barring federal-court evidentiary hearings, AEDPA created an "innocence" exception based on new evidence for petitioners who acted diligently. 28 U.S.C. § 2254(e)(2)(A), (B).[1]

In other words, Congress knows how to incorporate a miscarriage-of-justice exception to overcome AEDPA procedural bars when it wants to do so. But Congress intentionally omitted the exception when it catalogued the various other exceptions to AEDPA's one-year limitations period. The plain statutory text is conclusive proof that Congress did not intend the miscarriage-of-justice exception to apply to § 2244(d)(1) generally, or to the new-evidence exception in particular. *David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) ("Congress likely did not conceive that the courts would add new exceptions."); *Flanders* v. *Graves*, 299 F.3d 974, 977 (8th Cir. 2002) (it is not the judicial branch's role to "engraft an additional judge-made exception onto congressional language that is clear on its face"); *Escamilla* v. *Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005) ("courts cannot alter the rules laid down in the text"); *Cousin* v. *Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) (noting that the "one-year limitations period established by § 2244(d) contains no explicit exemption for petitions claiming actual innocence" and declining to create one).

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[1] Because these two sections enhance the miscarriage-of-justice exception with a diligence requirement, Perkins reads them as evidence that Congress knew how to amend the exception, and that Congressional silence in § 2244(d) means that Congress intended to incorporate the exception without limitation. Resp. Br. 31. As explained below, that analysis has it exactly backward.

C. *Holland* properly applied the presumption that *every* federal statute of limitations incorporates equitable tolling.

Holland recognized that Congress drafts against background principles. One of those principles is a presumption that Congress intends every statute of limitations to include equitable tolling unless the statutory text expressly excludes it. The same is not true for the miscarriage-of-justice exception.

This Court has long recognized the availability of equitable tolling to extend a federal statute of limitation. E.g., *Sebelius* v. *Auburn Regional Med. Ctr.*, __ S. Ct. __, 2013 WL 215485, at *10 (Jan. 22, 2013) (citing the Court's case law dating back to the 1800s). The doctrine has become so well-established that since at least 1990—six years before Congress enacted AEDPA—this Court recognized that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor of 'equitable tolling.'" *Holland*, 130 S. Ct. at 2560 (citing *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)).

The reason underlying this presumption is that "[s]uch a principle is likely to be a realistic assessment of legislative intent." *Sebelius*, 2013 WL 215485, at *10 (quoting *Irwin*, 498 U.S. at 95). In other words, when Congress enacts a new statute of limitations, it does not write on a blank slate; this Court assumes that Congress intended the statute to preserve the equitable-tolling doctrine unless the statutory text shows a contrary intent.

It was against the backdrop of this historical equitable-tolling tapestry that Congress adopted AEDPA in 1996. Thus, when asked to decide whether AEDPA's general one-year limitations period included equitable tolling, this Court in *Holland* began with the "hornbook law that limitations periods are customarily subject to equitable tolling." 130 S. Ct. at 2560 (internal quotation marks omitted). The Court concluded that AEDPA's language regarding the general one-year limitations period for filing a habeas petition did not rebut the *Irwin* presumption. By failing to affirmatively exclude the equitable-tolling doctrine, Congress intended to incorporate equitable tolling.

D. There is no presumption that *any* federal statute includes the miscarriage-of-justice exception.

In *Holland*, this Court applied the *Irwin* presumption, which dictates how federal statutes are construed. The assumption Perkins wants the Court to apply here is very different because the miscarriage-of-justice exception never had been applied to infer new terms into any federal statute. (Perkins says this Court has "also applied [the exception] to limits created by Congress." Resp. Br. 17. But he cites no authority for that proposition.)

This is true for a simple reason: such an exception only makes sense in the context of a collateral attack on a state-court conviction, and until Congress adopted AEDPA in 1996, there was no habeas limitations period. While the exception was sometimes used to excuse untimely state filings, there has never been a judicial presumption that the exception applies absent

explicit statutory language to the contrary. In other words, Congress *was* writing on a clean slate with AEDPA's statute of limitations and the miscarriage-of-justice exception, with historical backdrop providing only the principles of timely filing and diligence. Pet. Br. 19–21, 26–27.

So this case is the reverse of *Holland*. It is not enough for Perkins to show that Congress did not *exclude* the miscarriage-of-justice exception; it is Perkins' burden to demonstrate that Congress affirmatively *included* the exception when drafting § 2244(d)(1)(D). But as explained above, AEDPA's text demonstrates the exact opposite.[2]

Perkins' analysis of AEDPA's successive-petition and evidentiary-hearing provisions illustrates his error. As noted, both provisions expressly adopt the miscarriage-of-justice exception with an added diligence requirement. Thus, Perkins argues:

> These provisions demonstrate Congress's detailed attention to, and ability to amend, the miscarriage of justice exception through AEDPA. It also reveals Congress's intent to leave the exception in place for untimely

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[2] In *Holland*, this Court held that equitable tolling's rebuttable presumption outweighed the fact that Congress specified statutory tolling in § 2244(d)(2) but omitted equitable tolling in § 2244(d)(1). Such specification was necessary given the differences between state and federal post-conviction procedures. *Holland*, 130 S. Ct. at 2561–62. But here, Michigan is relying on much more than just the miscarriage-of-justice exception's omission; § 2244(d)(1) occupies the field by opening a one-year window to file a claim based on new evidence regardless of any assertion of innocence.

> petitions. . . . [H]ad Congress sought to *prohibit* courts from incorporating the exception into AEDPA's limitations period, it would have done so expressly, as it did elsewhere. [Resp. Br. 31–32 (emphasis added).]

But that's the point: Congress in § 2244(d)(1)(D) did expressly account for the circumstance Perkins presents—new evidence that gives rise to a constitutional claim—and specifically adopted a procedure for it. Courts have no authority to read in a limitation that defeats the scheme Congress created.

Even if examined as legislative silence (i.e., absent the presumption that was present in *Holland* for equitable tolling), the fact that "Congress was silent" on the miscarriage-of- justice exception's application to § 2244(d)(1)(D), Resp. Br. 31, means the exception is excluded. *Flanders*, 299 F.3d at 977 ("The statute fixes a one-year period of limitations, and says nothing about actual innocence, even though other parts of AEDPA, enacted at the same time, do refer to this doctrine. It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face.") (citation omitted). It is one thing for this Court to apply a presumption when this Court has forewarned Congress that it will do so. It is another matter entirely to write new language into a statute where Congress had no warning.

Perkins' argument is that Congress enacted AEDPA against the background of the miscarriage-of-justice exception, and AEDPA lacks a "clear command" overriding the exception. Resp. Br. 2, 29. In his view, the exception is just like equitable tolling and should likewise be presumed included unless a statute

affirmatively excludes it. But it makes no sense for Congress to address new evidence that gives rise to new constitutional claims and then anticipate that the Court would nonetheless apply a new miscarriage-of-justice presumption. Even if Congress's language is somehow construed as silence regarding the miscarriage-of-justice exception, it is Perkins' burden to identify the exception in § 2244(d)(1)(D)'s plain text.

And make no mistake—a judicially rewritten statute is precisely what Perkins seeks. Whereas § 2244(d)(1)(D) says that a habeas petitioner may file a claim within one year following the discovery of new evidence supporting the claim, Perkins asserts that a petitioner may file indefinitely. There is no basis for such a judicial amendment without first putting Congress on notice that the lack of affirmative *exclusion* will be interpreted as intentional *inclusion*.

In sum, § 2244(d)(1)(D) occupies the field for the miscarriage-of-justice exception by providing one year to file all habeas claims based on new evidence, whether or not the defendant asserts innocence. And no pre-AEDPA case created a presumption that required Congress to exclude the exception. It therefore violates AEDPA's mandate and the separation of powers to rewrite the statute to include the exception. And it is illogical to think that Congress required petitioners to pursue new evidence diligently, 28 U.S.C. § 2244(d)(1)(D), but intended to allow an indefinite time within which to file a habeas petition based on that evidence. "Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Escamilla*, 426 F.3d at 872.

E. Numerous policy reasons underlie Congress's decision not to incorporate a miscarriage-of-justice exception into the habeas statute of limitations.

Congress's decision to exclude a miscarriage-of-justice exception in AEDPA's statute of limitations makes sense for a number of reasons.

To begin, AEDPA has a limitations period because delay undermines a state's interest in responding while evidence is still fresh. That competing state interest demands prompt pursuit of a claims. Equitable tolling recognizes that sometimes events conspire to prevent a petitioner from prompt pursuit. *David*, 318 F.3d at 347 ("A defendant who could not have filed his petition earlier is at least a sympathetic figure; one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack.").

In contrast, the purpose of the miscarriage-of-justice exception is to relieve a litigant not from congressional limits but from court-created procedural bars. The cases Perkins cites (at 21–25) illustrate this. See *Kuhlmann* v. *Wilson*, 477 U.S. 436, 449–52 (1986) (court-created bar against successive petitions); *McCleskey* v. *Zant*, 499 U.S. 467, 494–95 (1991) (court-created bar against abusive petitions); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (court-created bar based on failure to develop facts in state court); *House* v. *Bell*, 547 U.S. 518, 522 (2006) (court-created bar of procedural default); *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991) (same); *United States* v. *Addonizio*, 442

U.S. 178, 185 (1979) (court-created bar for non-constitutional errors asserted in habeas).[3]

And in the paradigmatic equitable-tolling case, a habeas petitioner timely presented all of his claims to a state court, and those claims already have been resolved. The problem is that something beyond the petitioner's control prevented him from timely filing his habeas claim, and he is required to file promptly when that barrier has been lifted. So equitable tolling is true tolling.

In contrast, Perkins seeks nothing less than equitable abrogation. Because his equitable theory has no relationship to any extraneous person or thing preventing a filing, Perkins' theory allows habeas petitions to be filed in perpetuity. Such an infinite timeline for action is the antithesis of AEDPA.

Perkins' argument also renders § 2244(d)(1)(D) superfluous insofar as Congress sought to address the issue of new evidence that is both probative of innocence *and* relevant to a constitutional claim. While it is theoretically possible to separate these two purposes, Resp. Br. 43–44, the statute requires the new evidence to be wedded to a claim of a constitutional violation. Otherwise, the newly discovered evidence would have no significance to whether the petitioner was entitled to relief. See *Herrera* v. *Collins*, 506 U.S. 390, 400

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[3] Perkins also cites a statement concerning the denial of certiorari as proof this Court has used the miscarriage-of-justice doctrine to avoid the limits of former Habeas Rule 9(a), which operated like a "laches" doctrine. Resp. Br. 24. Again, this is a court-created procedural bar, not a congressionally imposed limit on the judiciary's habeas authority.

(1993) (no standalone actual-innocence claim with possible death penalty exception). Perkins' effort to sever § 2244(d)(1)(D)'s intertwined purposes ignores this reality and substantially reduces the provision's significance.

Finally, as this Court explained in *Holland*, equitable tolling necessarily involves a delay that is not the petitioner's fault. 130 S. Ct. at 2562. *Holland*'s inclusion of a diligence requirement underscores this point. *Id.* But application of the miscarriage-of-justice exception to AEDPA's statute of limitations relieves the habeas petitioner of his own negligence. There is no unfairness in denying relief to a non-diligent litigant, particularly when delay prejudices the state.

It is no coincidence that whenever this Court has applied the miscarriage-of-justice exception to excuse a court-created procedural bar, it has done so in the context of a claim filed within AEDPA's one-year statute of limitations. Pet. Br. 30. In such circumstances, the habeas petitioner has, by definition, pursued his federal claim promptly. Perkins proposes a world where there is no requirement to proceed promptly with a federal habeas claim. The Court should reject that world as unworkable and in conflict with AEDPA's purpose. H.R. Rep. No. 104-518, at 111 (1996) ("This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus."). More important, the Court should reject that world as inconsistent with AEDPA's plain text. It is not this Court's role to determine how Congress *should have* drafted the statute, as Perkins urges; the Court need simply apply the statute Congress actually enacted.

F. If the miscarriage-of-justice exception applies to habeas claims based on new evidence, the exception will also abrogate AEDPA's general one-year limitations period.

This case involves a § 2244(d)(1)(D) claim based on new evidence, but Perkins' logic applies equally to AEDPA's more general one-year limitations period in § 2244(d)(1). If Perkins prevails, any petitioner who misses the one-year filing window need simply recite "I'm actually innocent" when asserting his constitutional claim to avoid a statute-of-limitations dismissal under Habeas Rule 4.

The only possible distinction from the general one-year limitations period is that § 2244(d)(1)(D) petitioners pair their constitutional claim with new evidence. Resp. Br. 1. But if the equitable driving force is concern for the "innocent" petitioner, it makes no difference whether the petitioner has new evidence or claims constitutional error based on evidence previously presented. And unlike equitable tolling, application of the miscarriage-of-justice exception to AEDPA's general one-year limitations period would negate the provision. Equitable tolling takes the smallest possible bite out of § 2244's one-year requirement, excluding litigants only when an extraordinary circumstance "prevented timely filing" and the petitioner acted diligently. *Holland*, 130 S. Ct. at 2562. The miscarriage-of-justice exception contains neither restriction. So the exception's future application to § 2244(d)(1)'s general one-year limitations period—the natural result if this Court affirms the Sixth Circuit—will result in a flood of time-barred petitions that will overwhelm the courts' ability to identify the few

meritorious petitions in the system. *Herrera*, 506 U.S. at 426 (O'Connor and Kennedy, J.J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

Perkins' petition is a paradigmatic example of the type of petition abuses the courts will see if the Sixth Circuit's rule is upheld. Assuming the truth of all three affidavits Perkins has produced, he has at best established that Jones stabbed Henderson and had blood on his clothes. Those facts are entirely consistent with the theory the prosecutor presented to the jury: that Perkins and Jones murdered Henderson behind Dukette School *together*. Pet. Br. 10 (citing J.A. 113–14). And this new evidence does not contradict that Perkins (1) repeatedly told his friend Chauncy Vaughn he was going to kill Henderson, Pet. Br. 7 (citing J.A. 25), (2) confessed to Vaughn in detail after the murder had been committed, Pet. Br. 9 (citing J.A. 37–38), (3) told Torriano Player where to find Henderson's body, Pet. Br. 9 (citing J.A. 73), and (4) turned himself in to police, Pet. Br. 9 (citing J.A. 76).

To preserve the habeas process for those with legitimate claims of error, the courts should not process petitions like Perkins'. The courts should summarily dismiss time-barred petitions.

G. The new-evidence exception was designed for cold-case investigatory work and discoveries.

The law enforcement *amici curiae* note that it can take a long time to conduct cold-case investigatory work. But by focusing on the time needed to *discover* new evidence, the *amici* address the wrong question. Section 2244(d)(1)(D) places no time limit on when new evidence must be discovered—just that it be sought with diligence. Nor does Michigan urge otherwise.

The issue here is the one-year time limit § 2244(d)(1)(D) imposes *after* the factual predicate of a habeas claim has (or should have been) discovered. In short, § 2244(d)(1)(D) does not bar evidence that took 20 years to discover with diligence, provided that the petitioner brings his habeas claim within one year once the factual predicate *is* discovered. And while the *amici* believe that Congress's imposition of a diligence requirement is unwise, this Court does "not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders." *National Fed'n of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012).

In their brief, the *amici* discuss four "innocence cases" they believe indicate the importance of the "passage of time" in the process of discovering that a prisoner may be actually innocent. They add that "serendipity" plays an important role in discovering evidence that a person convicted of a crime is in fact innocent. And they assert that advances in science and technology often result in exonerating evidence being discovered many years after a conviction, which

requires further testing and investigation for corroboration and reliability. The *amici*'s reliance on these examples highlights *amici*'s misconception of the issue presented.

For example, the *amici* note that in the case of Larry Pat Souter, it took eight years "before sufficient evidence of innocence could be amassed to build a case strong enough to result in Souter's release from prison." (Law Enforcement *Amici* Br. 19.) But that point goes to when "the factual predicate of the claim" could be discovered in due diligence, not to the issue here: whether the petitioner must file his claim within one year after that factual predicate has been discovered.

The same is true of the new evidence concerning the "Central Park Five," who were convicted in 1990 and released when another man confessed to the murder in 2002. (*Id.* at 26–27.) The *amici* provide no reason why the five defendants—if they had not been freed by New York—could not file habeas petitions asserting a constitutional claim based on the confession within a year of it. 28 U.S.C. § 2244(d)(1)(D).

If an incarcerated defendant gets a new lead, pursues it vigorously, and is impeded by third parties or other circumstances beyond his control, he will have met § 2244(d)(1)(D)'s due diligence requirement so long as his efforts reflect forward momentum rather than inaction. And to the extent that state officials create impediments, AEDPA takes that into account in 28 U.S.C. § 2244(d)(1)(B).

Michigan agrees with *amici* that advances in forensic science do not occur overnight. But once they do occur, and a defendant uncovers the factual predicate for a new habeas claim, it is reasonable to require the defendant to act within one year. Section § 2244(d)(1)(D) requires nothing more.

II. At a minimum, a habeas petitioner seeking to avoid AEDPA's one-year limitation period for filing a claim based on new evidence must act with diligence.

This Court has long recognized that a litigant invoking equity must act diligently. E.g., *Pace* v. *DiGuglielmo*, 544 U.S. 408, 419 (2005) ("Under long-established principles, petitioner's lack of diligence precludes equity's operation."); *Irwin*, 498 U.S. at 96 (courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights"); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) (one "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence"); *McQuiddy* v. *Ware*, 20 Wall. 14, 19 (1873) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights.").

Pace, for example, involved a habeas petitioner who sought to invoke equitable tolling to excuse an untimely habeas petition under AEDPA. (*Pace* pre-dated *Holland* and assumed, without deciding, that equitable tolling was available to suspend AEDPA's general one-year limitations period. *Pace*, 544 U.S. at 418 n.8.) This Court's analysis of Pace's failure to pursue his claims diligently in state court applies

equally to Perkins' failure to pursue his claims based on purported new evidence:

> Petitioner's [state] petition set forth three claims. . . . The first two of these claims were available to petitioner as early as 1986. . . . The third claim . . . related only to events occurring in or before 1991.
>
> Yet petitioner waited years, without any valid justification, to assert these claims in his November 27, 1996 [state] petition. Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem, state or federal. . . . Under long-established principles, petitioner's lack of diligence precludes equity's operation. [544 U.S. at 418–19.]

Thus, if AEDPA's limitations period is going to be abrogated, the Court should, at the very minimum, contain a diligence requirement:

> We do not hold that actual innocence can never be relevant to a claim that the habeas statute of limitations should be equitably tolled. For such a claim to be viable, though, a petitioner would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations. [*Flanders*, 299 F.3d at 978.]

Such an approach, while deviating from § 2244(d)(1)(D)'s text, at least respects the intent to require diligence that Congress expressed in other provisions. 28 U.S.C. § 2244(b)(2)(B)(i)–(ii) (successive petitions); 28 U.S.C. § 2254(e)(2)(A), (B) (evidentiary hearings). The approach also honors the states' competing interest in the timely presentation of claims with new evidence, and it is consistent with some circuit courts' approach of adding a diligence component to the presentation of new evidence of innocence under the *Schlup* inquiry. E.g., *Amrine* v. *Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc) ("evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence").

Finally, if there is going to be an equitable abrogation of § 2244(d)(1)(D), it should at least take into consideration the fact that Congress wrote a "diligence" requirement into the provision. 28 U.S.C. § 2244(d)(1)(D) (one-year window runs from the "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of *due diligence*") (emphasis added). It makes little sense to say that a habeas petitioner must diligently pursue new evidence under § 2244(d)(1)(D), but that once he has that evidence in hand, he has an indefinite time within which to file a habeas petition.

A diligence requirement is fatal to Perkins' habeas petition. He did not pursue his federal habeas petition with even a modicum of diligence. Indeed, he did not claim otherwise below, and there is no credible basis to reach the contrary conclusion. Pet. App. 31a. Accordingly, the court of appeals should be reversed.

III. Perkins' other arguments lack merit.

Once this Court's decision in *Holland* and the differences between equitable tolling and the miscarriage-of-justice exception are clearly understood, Perkins' remaining arguments can be disposed in summary fashion.

First, Perkins claims that this Court has treated violations of AEDPA's statute of limitations the same as other "threshold constraints" on habeas applicants. Resp. Br. 34–36 (citing *Day* v. *McDonough*, 547 U.S. 198 (2006)). But *Day* involved district courts' power to *sua sponte* use a procedural bar to *prohibit* a habeas claim filed three weeks late, even where the state had not raised the issue. That decision was based on "values beyond the concerns of the parties," *Day*, 547 U.S. at 205, that AEDPA was designed to promote: conservation of judicial resources, comity, and finality. Those very concerns would be undermined if the Court affirmed the Sixth Circuit here.

Second, Perkins says that "general principles prove that AEDPA's limitations period incorporates the miscarriage of justice exception." Resp. Br. 30. Perkins again has it backward. This Court has repeatedly said that there is *no* constitutional right to collateral review. E.g., *Ryan* v. *Gonzales*, 133 S. Ct. 696, 704 (2013). And the focus of the habeas writ has always been the fairness of the proceedings against the habeas applicant in state court, not guilt or innocence. *Herrera*, 506 U.S. at 416. For those state prisoners that claim innocence based on new evidence, the "fail safe" is executive clemency. *Id.* at 415; accord *id.* at 427 (O'Connor and Kennedy, J.J., concurring) ("If the

Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, [the issue of a free-standing actual-innocence claim] may never require resolution at all."). The determination of whether a habeas applicant has suffered from a miscarriage of justice should primarily occur on the stage set by the state courts.

Third, Perkins asserts that this Court's adoption of the miscarriage-of-justice exception in the AEDPA statute of limitations context would *promote* federalism and comity by demonstrating that habeas courts give greater or equal respect to state procedural rules than their own. Resp. Br. 40. Not so. Federal courts conducting habeas review are supposed to "ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings." *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1316 (2012). Unlike equitable tolling, indefinite tolling destroys finality and shows a lack of respect for state proceedings.

Fourth, Perkins suggests that denying him relief would be "constitutionally problematic," Resp. Br. 41, presumably referencing the Suspension Clause. But this Court has already upheld AEDPA's added restrictions on second or successive habeas petitions, *Felker*, 518 U.S. at 664, and there is nothing unconstitutional about requiring habeas petitioners to file within one year after their state convictions become final, *Delaney* v. *Matesanz*, 264 F.3d 7, 11–12 (1st Cir. 2001); *Turner* v. *Johnson*, 177 F.3d 390, 392 (5th Cir. 1999).

Fifth, Perkins downplays potential gamesmanship associated with equitable abrogation, arguing that if a

witness dies or becomes unavailable, a state can just rely on the witness's prior testimony, and the court in any event can hold any unjustified delay against the petitioner. Resp. Br. 44–48. But new evidence will not always implicate the same witnesses who testified at trial; none of Perkins' affiants did so here. And habeas relief can also result from constitutional deficiencies in non-trial contexts, such as the plea-taking process.

Relatedly, Perkins says that the passage of time is a "double-edged sword" because his own witnesses may become ill, die, or lose the fortitude to testify. Resp. Br. 46. But Perkins' witnesses have already preserved their testimony by affidavit. And if one of those witnesses becomes unavailable, the state will not have the opportunity to question the witness. The passage of time is not a double-edged sword. Rather, it is a sword that is far more deadly to the state than to the habeas applicant wielding it.

Sixth, Perkins argues that barring consideration of late-filed claims of actual innocence will encourage habeas petitioners to file actions for federal habeas relief within a year of the discovery of each new piece of evidence, even if investigations are incomplete and claims concerning the evidence not ripe. Resp. Br. 39. This case does not even present that issue, because Perkins did not file his petition until nearly six years after procuring the final affidavit.

Finally, Perkins mistakenly characterizes Michigan Court Rule 6.502(G)(2) as a mechanism to raise only a free-standing actual-innocence claim in state court, rather than a tool to use new evidence as a gateway to a connected constitutional claim. Resp. Br. 55. There is no such limiting language in the rule.

Perkins also denigrates Michigan's court system and the executive clemency process as inadequate. *Id.* at 55–56 (saying it is "cold comfort" to be able to return to the state courts). Such an attack does great damage to long-standing principles of federalism, comity, and finality. As this Court has recognized:

> Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.
>
> Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes. Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh. [*McCleskey*, 499 U.S. at 491–92 (Kennedy, J.) (citations omitted).]

All of these interests are implicated by Perkins' time-barred claim here, and a failure to limit *Holland* to equitable tolling risks gutting AEDPA with equitable exceptions. The Court should enforce Congress's clear command in AEDPA and reverse the court of appeals.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN,
Petitioner
v.
FLOYD PERKINS
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ALABAMA, COLORADO, GEORGIA, IDAHO, INDIANA, KANSAS, MAINE, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

The States prosecute crimes and incarcerate criminals, so they have powerful interests in the finality of state-court judgments and society's "high degree of confidence in its criminal trials." *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring). Those interests are undermined by the rule adopted below. That rule creates an unbounded equitable-tolling exception to the AEDPA statute of limitations based on a showing of "actual innocence," which is as costly as it is unjustified. The *amici* States thus stand to benefit, along with the justice system as a whole, if this Court reverses the Sixth Circuit.

To be clear, the *amici* States do not contend that no innocent person has ever been convicted of a crime. Law is a human institution, and fallibility is a universal human trait. It is thus a "truism, not a revelation" that our "system of criminal punishment" must accept the "possibility that someone will be punished mistakenly." *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring). That possibility is "sensitive and, to say the least, troubling." *Herrera*, 506 U.S. at 421 (O'Connor, J., concurring). And it fully justifies post-conviction procedures that enable persons who claim to be innocent to seek their release, such as the statutory exception to the one-year statute of limitations for federal habeas petitions based on new evidence. *See* 28 U.S.C. § 2244(d)(1)(D).

But society's universal concern with imprisoning the innocent does not justify the exception to the federal statute of limitations that the Sixth Circuit

created below. Even though society's interest in vindicating claims of innocence is important, there are countervailing interests that require all litigation to have an end. Congress struck the right balance between these interests, and the lower court struck the wrong one. The lower court's rule exacerbates the practical difficulties of post-conviction litigation and ignores the deleterious effects of false actual-innocence claims. *Amici* submit this brief to highlight these countervailing costs and explain why this exception to the statute of limitations is unjustified.

SUMMARY OF ARGUMENT

I. Respondent cannot justify the lower court's rule on the grounds that it provides a remedy for wrongful convictions. It appears that almost all States already provide a forum in which claims of actual innocence can be raised and litigated based on new evidence that arises many years after a trial and conviction. In fact, if Respondent had a legitimate claim, it seems clear that he could have filed a post-conviction petition in Michigan state court, instead of federal court. Moreover, executive clemency is the traditional remedy for wrongful convictions, and it continues to provide a meaningful backstop when prisoners have a legitimate claim of actual innocence. In light of these available remedies, the lower court's unlimited actual-innocence exception to the statute of limitations is unnecessary.

II. The lower court's rule also imposes substantial costs on the criminal justice system.

Congress enacted the one-year statute of limitations after finding that federal habeas litigation was plagued by unnecessary delay and repetition. The actual-innocence exception to the statute exacerbates those problems. It is difficult for States to litigate asserted constitutional violations years after a verdict; it is even harder to litigate claims of actual innocence. Witnesses, lawyers, and police officers will have moved or passed away, exhibits will have been misplaced, and the prisoner's evidence will be hard to rebut or place in context. These are the very concerns that compelled Congress to enact the statute of limitations.

The actual-innocence exception also poses a special problem because it is so easily manipulated by convicted criminals. Most claims of actual innocence are not legitimate. But convicted criminals have every incentive to make them. The cases of Roger Keith Coleman, Sirhan Sirhan, and Thomas Arthur illustrate the societal costs of litigating these claims years after a conviction. These persons are all clearly guilty, but their actual-innocence claims have nonetheless undermined the public's confidence in the criminal justice system and have delayed the finality of their convictions.

ARGUMENT

The costs of the Sixth Circuit's rule far outweigh its benefits. As explained below, the States already have put into place ample mechanisms to ensure that innocent people are not imprisoned. No one has shown that these mechanisms are insufficient for these persons. The Sixth Circuit's rule merely

ensures that guilty prisoners will use spurious and false claims of actual innocence to extend the review process and impose precisely the sorts of costs on the habeas system that AEPDA was designed to eliminate.

I. States already provide relief for legitimate claims of actual innocence.

There is little benefit to the lower court's equitable-tolling rule. Although society certainly has an interest in seeing that the wrongly convicted are not unjustly punished, the lower courts' actual-innocence exception is a costly federal solution to a problem that the States can solve for themselves. State officials do not want the wrongly convicted to remain in prison any more than federal courts do. The States therefore provide a mix of judicial and executive remedies for *legitimate* claims of actual innocence, which can be tailored to the specific needs of each State's criminal justice system. In light of these state-specific remedies, there is no compelling need for the federal courts to intervene.

A. State judicial remedies for wrongful convictions.

Federal habeas litigation is not the best way to resolve claims of innocence for state prisoners who have already been adjudicated guilty beyond a reasonable doubt. In fact, state courts are much friendlier, as a general matter, to actual-innocence claims than federal district courts. In many States, a

freestanding claim of actual innocence is itself grounds to vacate a conviction, regardless of whether there was a constitutional violation or procedural error in reaching the conviction. *See, e.g.*, Idaho Code Ann. § 19-4901(a)(6); Va. Code Ann. § 19.2-327.10; *People v. Ortiz*, 919 N.E.2d 941, 948-949 (Ill. 2009). But "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400. Because federal habeas review is limited to the "clearly established" precedents of this Court, federal courts routinely deny habeas petitions based on freestanding claims of actual innocence. *Compare Ex parte Henderson*, 2012 WL 6027455 at *1 (Tex. Crim. App. Dec. 5, 2012) (ordering new trial because of new evidence of innocence), *with Sherrill v. Thaler*, 2012 WL 718942 at *7 (S.D. Tex. Mar. 5, 2012) ("[P]etitioner's actual innocence claim must be rejected because a freestanding claim of actual innocence is not a cognizable claim for federal habeas relief.").

The States have also developed innovative procedures to weigh and resolve claims of actual innocence. North Carolina is a good example. In 2006, the Legislature of North Carolina created an independent eight-member "Innocence Inquiry Commission" "to investigate and determine credible claims of factual innocence." N.C. Gen. Stat. § 15A-1461. The commission reviews claims by convicted prisoners that they are factually innocent and, if found valid, refers those claims to a special three-judge panel authorized to release the prisoners from

their sentence. *See* N.C. Gen. Stat. § 15A-1469. Although the Commission's proceedings are confidential, its decisions to grant relief are public. Most recently, in April of 2012, the Commission recommended full judicial review of a rape conviction after DNA analysis of hair samples found at the scene did not match the convict. *See State v. Grimes*, N.C. Innocence Inquiry Comm'n Op., 87-CRS-13541-42 (Apr. 11, 2012).[1]

It appears that almost all States would allow post-conviction litigation based on new evidence of innocence even if the evidence arises long after the conviction. States with a short post-conviction statute of limitations generally provide an equitable catch-all exception to the statute of limitations or a discovery-rule exception for claims based on new evidence that could not have been uncovered at the time of trial.[2] Some States treat belated post-

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[1] http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/2012.04.13%20Filed-Stamped%20Commission%20Opinion.pdf (Dec. 13, 2012).

[2] States with discovery-rule exceptions include Alabama, Ala. R. Crim. P. 32.1(e); *id.* 32.2(c), Alaska, Alaska Stat. § 12.72.010(4); *id.* § 12.72.020(b)(2), Arizona, Ariz. R. Crim. P. 32.1(e) & 32.4(a), Florida, Fla. R. Crim. P. 3.850 & 3.851, Georgia, Ga. Code Ann. § 9-14-42(c)(4), Iowa, Iowa Code § 822.2, Kentucky, Ky. R. Crim. P. 11.42(10)(a), Louisiana, La. Code Crim. Proc. Ann. art. 930.8(A)(1), Maine, Me. Rev. Stat. Ann. tit. 15, § 2128(b), Minnesota, Minn. Stat. § 590.01(4)(b) & (c), Mississippi, Miss. Code Ann. § 99-39-5(2)(a)(1), Montana, Mont. Code Ann. § 46-21-102(2), Ohio, Ohio Rev. Code Ann. §§ 2953.21(A) & 2953.23, Oregon, Or. Rev. Stat. § 138.510(3), Pennsylvania, 42 Pa. Cons. Stat. Ann. § 9545(b), South Carolina, S.C. Code Ann. § 17-27-45(c), Utah, Utah Code Ann. § 78B-9-107(2)(e), and Washington, Wash. Rev. Code Ann. § 10.73.090. States with catch-all exceptions include Colorado,

conviction petitions based on new scientific evidence more favorably than petitions based on other kinds of new evidence. *See* Ark. Code Ann. § 16-112-201(a); Idaho Code Ann. § 19-4902; Miss. Code Ann. § 99-39-5; Tenn. Code Ann. §§ 40-30-102 & 303; Wyo. Stat. Ann. § 7-12-303. Other States treat belated evidence or claims of actual innocence more favorably than evidence or claims about constitutional violations. *See, e.g.*, Utah Code Ann. § 78B-9-107(4)(b); 725 Ill. Comp. Stat. 5/122-1(c). Finally, some States impose no hard-and-fast statute of limitations on post-conviction petitions.[3]

The upshot is that, although a claim may be barred in federal court, the claim will not necessarily be foreclosed in state court. For example, in this case, it seems likely that Respondent could file a successive motion for relief from his criminal sentence in Michigan state court. *See* Mich. Ct. R. 6.502(G)(2). Michigan has no statute of limitations. And, if Respondent's claim is truly based on "new evidence that was not discovered before the first such

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Colo. Rev. Stat. Ann. § 16-5-402(2)(d), Delaware, Del. Super. Ct. Crim. R. 61(i)(5), Kansas, Kan. Stat. Ann. § 60-1507(f)(2) ("manifest injustice"), Maryland, Md. Code Ann. Crim. Proc. § 7-103 (ten-year limit waived for "extraordinary cause"), New Jersey, N.J. Ct. R. 3.22-12(a)(1) (five-year limit waived for "fundamental injustice"), Texas (with respect to capital cases), Tex. Code Crim. Proc. Ann. art. 11.071(4A), and Arkansas, *Echols v. State*, 201 S.W.3d 890, 894 (Ark. 2005) (although limit on statutory procedure, no time limit on petition for coram nobis).

[3] *See, e.g.*, N.D. Cent. Code § 29-32.1-03 ("An application may be filed at any time."); R.I. Gen. Laws § 10-9.1-3 (same); Wis. Stat. Ann. § 974.02 (same); *see also In re Reno*, 283 P.3d 1181, 1207 (Cal. 2012) (must file without "substantial delay").

motion," *id.*, he could file a successive motion. This federal case—and the exception to the statute of limitations that the lower court created—is unnecessary.

B. State executive remedies for prisoners who are actually innocent.

In addition to these judicial avenues, the States make use of executive clemency to achieve justice in situations where there is doubt as to a prisoner's guilt. Executive "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 412. Indeed, "[i]t is precisely because society remains uneasy with the judicial process of criminal law enforcement that it has placed outside the courts the power to review and adjust sentences." Note, *A Matter of Life and Death: Due Process Protection in Capital Sentencing Proceedings*, 90 YALE L.J. 889, 898 (1981). All 50 States currently have constitutional or statutory provisions for executive clemency, which may be exercised on the basis of actual innocence.[4]

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[4] Ala. Const. amend. XXXVIII, Ala. Code § 15-18-100; Alaska Const. art. III, § 21, Alaska Stat. § 33.20.070; Ariz. Const. art. V, § 5, Ariz. Rev. Stat. Ann. §§ 31-443, 31-445; Ark. Const. art. VI, § 18, Ark. Code Ann. §§ 5-4-607, 16-93-204; Cal. Const. art. V, § 8; Colo. Const. art. IV, § 7, Colo. Rev. Stat. Ann. §§ 16-17-101, 16-17-102; Conn. Const. art. IV, § 13, Conn. Gen. Stat. § 54-130a; Del. Const. art. VII, § 1, Del. Code Ann. tit. 29, § 2103; Fla. Const. art. IV, § 8, Fla. Stat. § 940.01; Ga. Const. art. IV, § 2, Ga. Code Ann. §§ 42-9-20, 42-9-42; Haw. Const. art. V, § 5, Haw. Rev. Stat. § 353-72; Idaho Const. art. IV, § 7, Idaho

Executive clemency is no hollow promise. Instead, our "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial

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Code Ann. §§ 20-240, 67-804; Ill. Const. art. V, § 12, 730 Ill. Comp. Stat. 5/3-3-13; Ind. Const. art. V, § 17, Ind. Code §§ 11-9-2-1 to 11-9-2-4; Iowa Const. art. IV, § 16, Iowa Code § 914.2; Kan. Const. art. I, § 7, Kan. Stat. Ann. § 22-3701; Ky. Const. § 77; La. Const. art. IV, § 5(E), La. Rev. Stat. Ann. § 15:572; Me. Const. art. V, pt. 1, § 11, Me. Rev. Stat. Ann. tit. 34-A, § 5210; Md. Const. art. II, § 20, Md. Code Ann. Corr. Servs. § 7-601; Mass. Const. pt. 2, ch. II, sec. I, art. VIII (amended by Article LXXIII of Amendments); Mich. Const. art. V, § 14; Minn. Const. art. V, § 7, Minn. Stat. § 638.01 et seq.; Miss. Const. art. V, § 124, Miss. Code Ann. § 47-5-115; Mo. Const. art. IV, § 7, Mo. Rev. Stat. §§ 217.220, 552.070; Mont. Const. art. VI, § 12, Mont. Code Ann. §§ 46-23-301 to 46-23-316; Neb. Const. art. IV, § 13, Neb. Rev. Stat. §§ 83-1,127 to 83-1,132; N.Y. Const. art. IV, § 4, N.Y. Exec. Law § 15; Nev. Const. art. V, § 13, Nev. Rev. Stat. § 213.080; N.H. Const. pt. 2, art. 52, N.H. Rev. Stat. Ann. § 4:23; N.J. Const. art. V, § 2, ¶ 1, N.J. Stat. Ann. §§ 2A:167-4, 2A:167-12; N.M. Const. art. V, § 6, N.M. Stat. Ann. § 31-21-17; N.C. Const. art. III, § 5(6), N.C. Gen. Stat. §§ 147-23 to 147-25; N.D. Const. art. V, § 7, N.D. Cent. Code § 12-55.1-02; Ohio Const. art. III, § 11, Ohio Rev. Code Ann. §§ 2967.01 to 2967.12; Okla. Const. art. VI, § 10; Or. Const. art. V, § 14, Or. Rev. Stat. §§ 144.649 to 144.670; Pa. Const. art. IV, § 9; R.I. Const. art. IX, § 13; S.C. Const. art. IV, § 14, S.C. Code Ann. §§ 24-21-910 to 24-21-1000; S.D. Const. art. IV, § 3, S.D. Codified Laws §§ 23A-27A-20 to 23A-27A-21, 24-14-1; Tenn. Const. art. III, § 6, Tenn. Code Ann. §§ 40-27-101 to 40-27-109; Tex. Const. art. IV, § 11, Tex. Crim. Proc. Code Ann. art. 48.01; Utah Const. art. VII, § 12, Utah Code Ann. § 77-27-5.5; Vt. Const. ch. II, § 20, Vt. Stat. Ann. tit. 28, § 453; Va. Const. art. V, § 12, Va. Code Ann. § 53.1-230; Wash. Const. art. III, § 9, Wash. Rev. Code Ann. § 10.01.120; W. Va. Const. art. VII, § 11, W. Va. Code § 5-1-16; Wis. Const. art. V, § 6; Wyo. Const. art. IV, § 5, Wyo. Stat. Ann. § 7-13-801.

motion, has been executive clemency." *Herrera*, 506 U.S. at 415. "[O]ver the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." *Id.* In fact, less than a month before this brief was filed, the Governor of Virginia pardoned an inmate because of doubts about his conviction. *See Johnathan Montgomery, Va. man in prison for false rape claim, being freed* (Nov. 20, 2012).[5] The Governor acted on the prisoner's application for a pardon "in under 20 hours." Press Release, *Governor McDonnell Issues Conditional Pardon Effective Immediately for Johnathan Montgomery* (Nov. 20, 2012).[6] This and other recent examples of executive clemency underscore that it is a very real possibility for an inmate with a *legitimate* claim of actual innocence.[7]

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[5] http://www.wjla.com/articles/2012/11/johnathan-montgomery-va-man-in-prison-for-false-rape-claim-being-freed-82298.html#ixzz2ErzHo6DW.

[6] http://www.governor.virginia.gov/news/viewRelease.cfm?id=1516.

[7] *See, e.g.*, Steve McVicker & Roma Khannaa, *After 9 years, inmate granted Perry pardon*, HOUSTON CHRON. (Aug. 17, 2007), http://www.chron.com/news/houston-texas/article/After-9-years-inmate-granted-Perry-pardon-1616305.php ("Since 2001, Perry has granted 14 pardons based on innocence, according to parole board records."); Steve Mills & Maurice Possley, *Ryan To Pardon 4 on Death Row*, CHI. TRIB., Jan. 10, 2003.

II. The exception to the one-year statute of limitations will impose substantial costs on the criminal justice system.

The Sixth Circuit's rule opens the federal courts to more belated petitions than Congress wanted and undermines the States' interest in seeing habeas litigation end as efficiently as possible. There are procedures for federal courts to review belated claims of constitutional violations. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(D). But, as Petitioner explains, the lower court's unbounded equitable-tolling exception "upset[s] the delicate balance Congress crafted" between the costs and benefits of untimely habeas litigation. Pet. Br. 5. Because of the difficulties of litigating guilt and innocence many years after a crime, each new and belated actual-innocence claim that the lower court's rule allows will increase the risk that someone who is *not* innocent will escape rightful punishment. Moreover, each of these claims effectively libels the criminal justice system and undermines the public's confidence in it. Finally, these claims increase the cost of criminal justice, requiring the States and federal government to spend resources litigating about the validity of old convictions instead of securing new ones.

A. Congress enacted AEDPA because of substantial delay and cost in federal habeas.

Congress was well aware of the costs of *ad infinitum* federal habeas litigation when it enacted the one-year statute of limitations. In 1989, a

Judicial Committee chaired by Justice Lewis Powell found "serious problems with the present system of collateral review . . . broadly characterized under the heading of unnecessary delay and repetition." *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report*, printed in 135 Cong. Rec. S13471-04, S13482 (Oct. 16, 1989) (hereinafter "Powell Committee Report"). To fix these problems, the Powell Committee proposed, and Congress enacted, a statute of limitations for federal habeas claims. *See* Statement of Senator Joseph Biden, 135 Cong. Rec. S13471-04, S13473 (Oct. 16, 1989) ("[T]he Powell committee recommended that the time period . . . should be limited to 6 months. . . . [M]y bill would require the [federal] habeas corpus petition to be filed within 1 year."). The Sixth Circuit's exception for claims of actual innocence—particularly when it is unbounded by any requirement of diligence by the petitioner—threatens to revive the "unnecessary delay and repetition" that the States experienced before this innovation. *See* Powell Committee Report, 135 Cong. Rec. at S13482.

1. The statute of limitations serves important goals. In adopting the one-year limit, Congress recognized that parties cannot effectively litigate habeas petitions years after a conviction because "the passage of time may make reliable determinations of asserted claims . . . difficult or practically impossible." *E.g.*, Statement of Senator Charles Grassley, 136 Cong. Rec. S6789-03, S6828 (May 23, 1990). This Court has similarly explained that "factual determinations are often dispositive of" constitutional claims like ineffective assistance of counsel, "coerced confession, lack of competency to

stand trial, and denial of a fair trial." *Peyton v. Rowe*, 391 U.S. 54, 62 (1968) (citations omitted). Those factual issues are, by their nature, difficult to assess years after the facts actually arose. Delaying "the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id.*

The Sixth Circuit's innocence-tolling rule is likely to lead to delays and piecemeal litigation. Especially since the tolling rule is not constrained by a requirement that the petitioner use reasonable diligence in exercising his claims, it gives inmates the freedom to wait to file habeas petitions until the State's evidence has become stale and the only remaining evidence shifts to their maximum advantage. This is a special problem in capital cases. As the Powell Committee explained, "[t]he inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out." 135 Cong. Rec. at S13482.

2. The "innocence" tolling rule also has special costs above and beyond those normally associated with habeas review. Although it is difficult to litigate anything years after the event has occurred, it is especially difficult to litigate *guilt and innocence* years after the crime was committed. But that is precisely what the Sixth Circuit's rule requires. For every habeas petitioner that asserts his innocence, the State will have to refute his claim with an evidentiary presentation from his trial.

The practical impediments to that kind of mini-retrial are substantial. "Witnesses die or move away;

physical evidence is lost; memories fade." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). "Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the State's ability to reconstruct its case." *Id.* (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970)). The prosecutors, police officers, witnesses, and victims involved in the case will have moved on. The upshot is that a State starts from a disadvantaged position in refuting an innocence claim when it is brought years after the inmate was prosecuted and convicted.

B. Unfounded claims of actual innocence consume State resources and undermine the criminal justice system.

Any rule to address claims of actual innocence must account for the unfortunate but undeniable fact that unscrupulous prisoners falsely claim that they are innocent all the time. The paradigm is the petitioner's actual-innocence claim in *Herrera*. There the petitioner argued that he should be able to seek habeas relief on the grounds that he was "actually innocent," even though the State did not violate any of his constitutional rights. Justices O'Connor and Kennedy were sympathetic to the petitioner's constitutional theory, but dismissed his particular case as "neither difficult nor troubling" because "[p]etitioner is not innocent, in any sense of the word." 506 U.S. at 419, 421 (O'Connor, J., concurring). In *Herrera*, "[t]he record

overwhelmingly demonstrate[d] that petitioner" was guilty despite his innocence claim. *Id.* at 421.

These unfounded actual-innocence claims impose substantial costs on the system. Especially when publicized, these claims undermine society's faith in the criminal justice system and the finality of long-established convictions. They also require a large amount of resources to litigate and resolve. These costs arise even in cases like *Herrera* where the habeas petitioner is 100% guilty. Here are three examples.

1. *Roger Keith Coleman.* Coleman's case gave rise to one of this Court's most significant decisions on the law of procedural default. In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court overruled *Fay v. Noia*, 372 U.S. 391 (1963), and held that an attorney's error in failing to file an appeal could bar the petitioner from pursuing his claims in federal court. That ruling was necessary, in part, because Coleman did not argue, before this Court, that he was actually innocent. But after this Court affirmed the dismissal of his petition, he turned around and very publicly—and very fraudulently—proclaimed his innocence.

Coleman was convicted of raping and murdering his sister-in-law in Virginia in 1982. *Coleman v. Commonwealth*, 307 S.E.2d 864 (1983). Coleman had previously been convicted of attempted rape, and blood on Coleman's clothes matched his victim's. *Id.* at 870, 876. Coleman was sentenced to death. *Id.* at 876.

Coleman's case first came to this Court's attention because it presented a difficult question

about procedural default. Coleman's post-conviction attorney had missed an appellate deadline in state court, and the lower courts held that this procedural failure blocked Coleman from pursuing, on federal habeas review, his federal claims of ineffective assistance of counsel. Coleman sought to circumvent that default, but made no claim that he could do so because he was actually innocent. He instead asserted that because the default resulted from his attorneys' errors he could show justifiable "cause" for his default. This Court held that Coleman's habeas petition was procedurally barred. "This is a case about federalism," the Court explained. "It concerns the respect that federal courts owe the States . . . when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

Following this Court's decision, Coleman turned to the avenue many prisoners choose when they are out of options—a fraudulent claim of actual innocence. Although he had not maintained that he could get around the procedural default through an actual-innocence exception before this Court, he filed yet another habeas petition in federal court, arguing this time that he was "actually innocent" and could surmount the procedural default. *See Coleman v. Thompson*, 798 F. Supp. 1209 (W.D. Va. 1992). All the relevant courts denied that petition. *See id.* at 1218; *see also Coleman v. Thompson*, 504 U.S. 188 (1992) (denying application for stay of execution).

Coleman's case then became a *cause célèbre*. *See Kansas v. Marsh*, 548 U.S. 163, 189 (2006) (Scalia, J., concurring) (discussing Coleman's case). Coleman appeared on several TV programs, and *Time*

magazine put him on its cover. "Roger Keith Coleman says he didn't kill anybody, but the courts are tired of listening," *Time* magazine intoned. "That could be a tragic mistake." Jill Smolowe, *Roger Keith Coleman: Must This Man Die?*, TIME (May 18, 1992). After Virginia's Governor received roughly 9,000 calls and letters in favor of clemency, he arranged for a lie-detector test, which Coleman failed. *See* Bonnie V. Winston & Greg Schneider, *Coleman put to death: High-profile defendant failed lie detector test*, ROANOKE NEWS, May 21, 1992, at A1, *available at* 1992 WLNR 1019950. Coleman was executed in 1992, and his last words were: "An innocent man is going to be murdered tonight." *Id.*

Public concern over Coleman's case only grew with his execution, and his supporters unabashedly used Coleman's claim of actual innocence to cast doubt on the legitimacy of the justice system. In 1998, for example, a book was published to make the case for Coleman's innocence, which "challeng[ed] the assumptions of anyone who believes that the American justice system is concerned primarily with justice." *See* Lisa Higgins, *Amazon.com Review of* May God Have Mercy *by John C. Tucker*, http://www.amazon.com/May-God-Have-Mercy-Punishment/dp/0385332947 (last visited Dec. 18, 2012).

But Coleman's innocence claim was a sham. Ten years after his execution, his legal team and a media consortium petitioned Virginia's Governor to allow new DNA testing of semen samples taken from Coleman's victim. The Governor agreed, and the DNA test confirmed what a jury had known more than twenty years earlier—that Coleman was guilty,

beyond a reasonable doubt. There was only a 1-in-19 million chance that the DNA belonged to someone else. *See* Michael D. Shear & Maria Glod, *Tests Show Dead Man's Guilt*, WASH. POST, Jan. 13, 2006, at B1, *available at* 2006 WLNR 26032589.

2. *Sirhan Sirhan*. Tragically, Sirhan Sirhan became a household name four decades ago. Many of those households' residents would be shocked to learn that his attorneys have recently filed a federal habeas petition claiming that he is "actually innocent."

Sirhan shot Senator Robert F. Kennedy in 1968, at close range in the pantry of a Los Angeles hotel. *See People v. Sirhan*, 497 P.2d 1121 (Cal. 1972). There has never been any doubt about his responsibility for this national tragedy. The assassination was witnessed by journalist George Plimpton, author Pete Hamill, and professional football player Rosey Grier. They were among the men who subdued and disarmed Sirhan after he fired his gun. *See* Pete Hamill, *Two Minutes to Midnight: The Very Last Hurrah*, VILLAGE VOICE (June 13, 1968).[8] Sirhan confessed to the murder, but the trial court refused to accept his guilty plea and required the prosecution to prove its case. *Sirhan*, 497 P.2d at 1127, 1133. Sirhan testified at trial that, although he admitted killing Kennedy, he could not specifically recall the shooting or confessing to the crime. *Id.* at 1127. Nonetheless, "it was undisputed that defendant fired the shot that killed Senator

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[8] http://blogs.villagevoice.com/runninscared/2010/05/pete_hamills_ey.php (last visited Aug. 20, 2012).

Kennedy." *Id.* at 1125. The prosecution established that Sirhan had killed Kennedy because of the Senator's support for Israel, and Sirhan was sentenced to life imprisonment. *Id.* at 1127-30.

Sirhan's attorneys have recently filed a federal habeas petition claiming that Sirhan is "actually innocent" of the crime. *See* Sur-Reply on the Issue of Actual Innocence, (Doc. 195), *Sirhan v. Galaza*, No. 2:00-CV-5686-CAS (C.D. Cal. Feb. 22, 2012). Sirhan's theory of "actual innocence" is that Sirhan was brainwashed or hypnotized into attacking Kennedy as a distraction while another, unidentified, shooter killed Kennedy as part of a conspiracy. *Id.* at 2-30. Because the habeas petition is pending in a district court within the Ninth Circuit, Sirhan's attorneys have invoked the Ninth Circuit's actual-innocence exception to the one-year statute of limitations. *Id.*

Sirhan's new allegations of actual innocence have been widely published. They have led to new conspiracy theories about Senator Kennedy's assassination 40 years after the fact. *See, e.g.*, Robert Vaughn, *I know who was behind Bobby Kennedy's murder, by his actor friend Robert Vaughn*, DAILY MAIL ONLINE (Jan. 12, 2009)[9] ("[O]ne of the greatest crimes of the 20th Century remains unresolved by the official verdict, even to this day."). And they have compelled state prosecutors to defend a conviction that was final some 40 years ago.

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[9] http://www.dailymail.co.uk/news/article-1111444/I-know-Bobby-Kennedys-murder-actor-friend-Robert-Vaughn.html (last visited Dec. 18, 2012).

3. *Tommy Arthur*. The lead amicus on this brief has long dealt with a less famous, but no less false, claim of actual innocence. Thomas Douglas Arthur killed his girlfriend's husband in Alabama in 1982. The evidence of guilt has always been overwhelming. Arthur's girlfriend, who was also convicted of the murder, initially told the police that she had been raped and that the rapist killed her husband. *See Arthur v. Allen*, 452 F.3d 1234, 1238-39 (11th Cir. 2006). In fact, as she later testified, she and Arthur conspired to kill her husband and intended to split her husband's life-insurance proceeds. *Id.* This was Arthur's second murder; he was on work-release from his first sentence when he committed it. *Id.* at 1239-40.

Because of procedural errors, Arthur was tried and convicted for the murder three times. At the conclusion of his third trial in 1991, Arthur personally asked the jury to recommend that the judge sentence him to death. Arthur told the jury that he "wouldn't dare ask you for it if I thought for a minute that I would be executed." Trial Transcript at 1181, State v. Arthur, CC-89-577 (Jefferson Cnty. Cir. Ct. 1991). Instead, Arthur told the jury that he had already managed to overturn his capital-murder conviction on two previous occasions and that, if he was sentenced to death, he would be in a better position to challenge his latest conviction too. The jury, and then the judge, obliged his request.

Since then, Arthur has made good on his promise to the jury. After his normal avenues of post-conviction litigation ran out, Arthur filed both an untimely federal habeas action and a civil-rights action, in which he alleged his "actual innocence"

and requested a DNA test of the rape kit used to examine his girlfriend-accomplice. The federal courts eventually dismissed both actions. *See Arthur*, 452 F.3d at 1253-54; *Arthur v. King*, 500 F.3d 1335, 1342 (11th Cir. 2007). The Eleventh Circuit noted that Arthur's civil-rights action was very late:

> [It was] filed twenty-five years after the crime, fifteen years after his third conviction and death sentence, nine years after the conclusion of his appeals on direct review, five years after the conclusion of his state postconviction proceedings, six years after the initial filing of his federal habeas petition, and four days before the Supreme Court denied his petition for writ of certiorari of his federal habeas petition.

Arthur, 500 F.3d at 1342.

Even though the courts universally concluded that "there was ample evidence linking Arthur to [the] murder," *id.*, Arthur's actual-innocence claims attracted public support. The *Birmingham News* has editorialized that "[i]t's inconceivable that the state of Alabama won't order DNA testing before executing a Death Row inmate who claims to be innocent." *DNA Testing for Arthur*, BIRM. NEWS (Nov. 29, 2007). The *Atlantic* has described Arthur's "excruciating case . . . an ugly case, tracking many of the failings of the human condition." *Another Death Row Debacle: The Case Against Thomas Arthur*, ATLANTIC (Feb. 27, 2012).

Then, three days before his execution date, Arthur filed a successive state post-conviction petition that again alleged his actual innocence. Arthur relied on newly discovered evidence—namely,

a signed and notarized confession from another convicted murderer, Bobby Gilbert, asserting that Gilbert had raped the girlfriend-accomplice and committed the murder. *See Arthur v. State*, 71 So. 3d 733, 750 (Ala. Crim. App. 2010). The Alabama Supreme Court issued a last-minute order staying Arthur's execution so that this successive petition could proceed. *Id.* at 738.

The trial court conducted an evidentiary hearing, at which the "State presented overwhelming evidence that Gilbert's affidavit is false and that Gilbert and Arthur conspired to fabricate the affidavit." *Id.* at 744. Nonetheless, the court "out of an abundance of caution" directed the State to "conduct D.N.A. testing on the available physical evidence in this case." *Id.* at 739. Unsurprisingly, the testing was not exculpatory—the only available DNA belonged to the victim, not Gilbert. *Id.* at 740. Arthur appealed all the way to this Court, which denied his cert petition last year. *See Arthur v. Alabama*, 132 S. Ct. 453 (2011).

For his part, Thomas Arthur is currently proceeding with yet another civil-rights action challenging Alabama's three-drug execution method. *See Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. 2012). There is little doubt that he has his next actual-innocence habeas petition prepared and ready to file when that civil-rights litigation ends. The tolling rule at issue here can only assist his decades-long effort to thwart the imposition of his sentence.

* * *

The proposed "actual innocence" exception to AEDPA's one-year statute of limitations comes with substantial costs. The lower court's tolling rule

undermines the States' interests, gives convicted criminals a new avenue to abuse the system, and threatens a return to the days before Congress enacted the one-year statute of limitations. Congress weighed these costs against the benefits of unchecked federal habeas litigation when it enacted AEDPA, and struck the right balance. Although Congress decided to let state prisoners file successive and untimely federal habeas petitions based on new evidence that materializes after trial, Congress was clear that such claims must be filed within a year of the discovery of that new evidence.

Especially in light of the judicial and executive remedies available on the state level, the lower court's open-ended equitable-tolling exception to the federal statute of limitations is unjustified. The lower court's rule gives convicted criminals like Coleman, Sirhan, and Arthur a new avenue to abuse the system, but it does not meaningfully improve on the systems that States already provide to vindicate *legitimate* claims of actual innocence. The States' interests in finality and efficiency outweigh the interest of prisoners in raising untimely claims in federal habeas, not only upon the discovery of new evidence, but more than one year after the new evidence is discovered.

CONCLUSION

The Court should reverse the Sixth Circuit.

Respectfully submitted,

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December 20, 2012

AMICUS CURIAE BRIEF

No. 12-126

In The
Supreme Court of the United States

GREG MCQUIGGIN,

Petitioner,

vs.

FLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* FOR FORMER AND CURRENT LAW ENFORCEMENT OFFICIALS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former and current police detectives and federal law enforcement officers, each of whom have expertise with resolving especially difficult to investigate crimes. We are all dedicated to the imperatives of: (1) safeguarding society by punishing culprits; and (2) bringing closure to victims by proving beyond reasonable doubt that the true perpetrator has been brought to justice. Each of us has decades of experience in crime solving, as well as in the work of finding and preserving evidence sufficient to withstand the test of adversarial process and court adjudication, to ensure true perpetrators are held accountable. Given our vocation and experiences, we feel particularly well-suited to comment on the competing views arising from the lower court decision here, that a credible showing of actual innocence may be a basis for excusing compliance with the AEDPA statute of limitations, even in the absence of a showing of diligence.

We have direct understanding of two questions at the core of this dispute: what does it actually take to find and present a credible showing of factual innocence; and what does it mean to put a one-year

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[1] Pursuant to Rule 37.6, *amici curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed their written consent to the filing of *amici* briefs pursuant to Rule 37.3.

statute of limitations or a diligence requirement on the process of doing so? We know first-hand that successful investigation in such circumstances may depend heavily on the passage of time. It would be impractical and inequitable to impose a one-year time limit on a petitioner's ability to present evidence of actual innocence, or to require proof of diligence.

AMICI CURIAE

Robert K. Cromwell: After serving nearly four years as a police officer in Montgomery Township, New Jersey, and two and one half years with the Naval Criminal Investigative Service, Mr. Cromwell served 22 years as a special agent with the Federal Bureau of Investigation (hereinafter "FBI" or "the Bureau"), and was involved in many types of complex criminal and corruption investigations, including the Oklahoma City bombing case. His final position was as Special Agent in Charge of the Jacksonville, Florida office. During the past four years, Mr. Cromwell has served as a board member of the Florida Innocence Project, and has reviewed the investigation of several cases that have led to exoneration.

Joseph P. Dwyer: Mr. Dwyer served five years as a police officer with the New York City Police Department. When he retired from law enforcement in 1995, he worked with the Street Narcotics Enforcement Unit in Manhattan North. He then founded his own private investigation firm, Investigative

Resource Group, Inc., which is staffed with former law enforcement officers. Among other wrongful conviction cases, Mr. Dwyer worked on the innocence investigation of William Lopez, discussed herein, who was recently granted habeas relief on an out-of-time petition in the Eastern District of New York because of strong evidence of innocence.

Henry O. Handy served as a Special Agent in the FBI from 1971 to 1992. He examined new evidence in the Norfolk Four case of Virginia, and advocated for the pardon of the Norfolk Four.

William "Lou" Hennessy was a member of the Metropolitan Police Department from 1973 until 1998. Hennessy was Commander of Homicide Investigations for the Metropolitan Police Department of the District of Columbia from 1993 until 1995. Presently, he is a Judge for the District Court for Charles County (Maryland).

Stanley Lapekas: Mr. Lapekas currently serves as the Regional Director of the private investigation firm Turnstone Investigative Group, Hunton & Williams, LLC, where he has worked since 2003. Prior to joining the firm, Mr. Lapekas was the Executive Secretary of the Virginia Charitable Gaming Commission, from 1998 to 2003. He served as a Special Agent with the FBI from 1974 until 1998, and served in the United States Army from 1966 to 1969. Mr. Lapekas was instrumental in building the innocence case of Michael Hash, discussed herein.

Gregg O. McCrary: Mr. McCrary served as a Special Agent at the FBI from 1969 through 1994. During his career at the Bureau, he took part in many complex investigations of violent crime. Since his retirement, he has continued to assist law enforcement agencies in the United States and around the world. He has participated in the investigation of the wrongly convicted.

Joe Newman served on the Battle Creek (Michigan) Police Department from 1976 to 2000. He served as Chief of Detectives for eight years and retired as a Commander in 2000.

Dana Orent: Mr. Orent is currently a private investigator and consultant specializing in gang investigations. He worked for 11 years as a gang detective with the Pasadena police department, working on violent gang crimes and cold-case gang homicides before retiring. He has done investigative work for the San Diego Innocence Project. Mr. Orent also worked an innocence investigation on behalf of Mario Rocha, whom prosecutors declined to retry after his homicide conviction was overturned in 2006.

James M. Petro: After serving as a prosecuting attorney in three Ohio jurisdictions, Mr. Petro served as Ohio Attorney General from 2003-2007. During his administration, he launched an effort that added more than 200,000 DNA profiles from Ohio to the national CODIS database. Also while Attorney General, he intervened in the case of Clarence Elkins, who had been wrongly convicted of murder. Mr. Petro and his

wife, Nancy Petro, co-authored the book, "False Justice: Eight Myths that Convict the Innocent."

John W. Raley: Mr. Raley was an assistant United States Attorney in the Western District of Oklahoma from 1961 through 1969, and served as United States Attorney for the Eastern District of Oklahoma from 1990 through 1997.

John Smietanka: Mr. Smietanka was the Berrien County (Michigan) Prosecuting Attorney from 1974 to 1981. He was the United States Attorney for Western Michigan from 1981 until 1994. After entering into private practice in Grand Rapids, Michigan, Mr. Smietanka worked on the innocence investigation and defense of Larry Pat Souter, discussed herein, who was released in 2005, after serving 13 years in jail for a crime he did not commit.

Larry B. Smith: Mr. Smith is a retired FBI Special Agent. His service with the Bureau began in 1983 and ended with his retirement in 2006. While at the Bureau, he participated in investigating many complex violent and major offender cases. Since his retirement, he has reviewed cases of prisoners claiming innocence. Michael Hash, one of these cases, is discussed herein.

Peter S. Smith: Mr. Smith served for ten years as a police officer on the Nassau County, New York Police Department, before retiring due to a line of duty injury. Mr. Smith then worked as a prosecutor for Suffolk County, New York District Attorney's office for seven years. He left in 2004 as the Deputy Chief of

the Insurance Crimes Bureau. Mr. Smith currently works as a defense attorney-investigator and is engaged in cases involving innocence claims in New York.

B. Frank Stokes, Jr.: Mr. Stokes served as a special agent of the FBI for 30 years, from January, 1971 until November 30, 2001, During his career, he led complex organized crime, white collar, personal and property crime, domestic and international terrorism and wrongful conviction investigations. Since his retirement, he has worked as a private investigator and worked on a number of cases involving claims of wrongful conviction. One former client, Jeffrey David Cox, was exonerated in 2001 by the Commonwealth of Virginia after Cox served eleven years in prison.

James Trainum: Mr. Trainum is a private consultant, reviewing cold and wrongful conviction cases. He has held this position since 2009. Previously he served as a D.C. Metropolitan Police Department homicide detective from 1983 to 2010.

Ken Winter: Mr. Winter served as Director of the Mississippi Crime Lab from May, 2000 through May, 2004. Since January, 2005, he has served as Director of Mississippi Police Chiefs. During the course of his service in each position, he has worked closely on cases that have led to exoneration of the wrongly convicted.

SUMMARY OF ARGUMENT

What it really takes to find and present persuasive evidence of actual innocence is at the heart of this case. Based on all of our experience with hard-to-investigate cases (including missing persons cases, "cold case" homicides, and other especially difficult, serious crimes),[2] we know that, often, the passage of time is precisely what allows new, and/or more probative and reliable evidence to emerge. In our view, it is accordingly not pragmatic, or fair, to limit a credible claim of actual innocence to a one year window, or to impose a diligence requirement – at least not in cases involving serious felony convictions – when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

We believe in the integrity of our criminal justice system. The chief aims of the criminal justice system are to convict the guilty and, equally, to insure that innocent citizens are not wrongly convicted. Yet, we know that, however rarely, mistakes are made. On those occasions the perpetrator goes free and unpunished, sometimes able to continue causing harm,

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[2] There is no standard definition for a "cold case." Common among the varied criteria used to designate such cases is that they are usually at least a year old, and could not be resolved "because of workload, time constraints, or the lack of viable leads." Robert C. Davis, Carl Jensen and Karen E. Kitchens, *Cold Case Investigations: An Analysis of Current Practices and Factors Associated with Successful Outcomes*, at iii, n.1 (Rand Center of Quality Policing, 2011).

while an innocent person ends up serving time for something he did not do.

We do not discuss the specific record in this case. Nor do we speak to whether the evidence of actual innocence proffered below is strong enough to warrant an equitable exception. We file this brief only to bring to the Court's attention the very real difficulties of finding and presenting evidence of actual innocence after a wrongful conviction, and to advise the Court as to the time-consuming process that will often be involved in rectifying any such fundamental miscarriage of justice. In doing so, we point the Court to four examples of innocence cases where the investigations of innocence relied on the passage of time to develop. Three of these cases, including Larry Souter of Michigan; Michael Hash of Virginia; and William Lopez of New York, are cases which some among us worked on directly, using our years of experience and training as former detectives and law enforcement officers. The fourth is the well-known New York case of the "Central Park Five," involving five teenagers who falsely confessed to a brutal crime. We believe our perspective on these issues is directly relevant to the dispute now under this Court's review and we thank the Court for considering our input.

ARGUMENT

I. Law Enforcement Officers Working Difficult-to-Investigate Crimes Often Rely on the Passage of Time.

As detectives and law enforcement officers, we have found that, in cases where the crime at issue was difficult to solve at the outset, the passage of time is often crucial to the development of a prosecutable case. In the words of one seminal text on solving cold case homicides, "[t]ime, once an enemy in homicide investigation, slowly becomes a friend."[3] The passage of time becomes a crucial element of strategy in the context of difficult-to-investigate cases because changes in relationships between people, as well as advances in technology, may lead to information which ultimately permits law enforcement officers to "crack" the case.

Relationships between people change in two dimensions. First, people generally change as time passes, and their relationship(s) to potential suspect(s), the victim(s), or witness(es) will shift. Loyalties or fears which previously dampened a person's willingness to help law enforcement, or otherwise come forward, will alter over time. This is especially true in gang and/or drug-related crimes. In a subdivision titled *Time as an Ally*, another text on

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[3] Richard H. Walton, *Cold Case Homicides: Practical Investigative Techniques*, at Introduction, iv (Taylor & Francis Group, LLC, 2006).

resources for unidentified, missing and cold homicide case investigations instructs that, "[t]ime – sometimes decades – can give people an opportunity to mature, to overcome former fears, and to develop a different sense of right and wrong."[4]

Secondly, as time passes, law enforcement officers are replaced, and/or investigators collaborate with new people. The relationships investigators have with potential witnesses and informants adjust accordingly. In such instances, investigators must patiently and persistently work to establish trust between themselves and others. Close working relationships with other investigative agencies, federal and state prosecutors, forensic scientists, witnesses and the victim's family members are critical factors to success with hard-to-solve cases.

Empirical research echoes these observations. One August 2009 study surveyed Colorado law enforcement officers as to their last resolved homicide over three years old. It found the most prevalent factors which "broke the case" included, at number one, "'previously unavailable witness,'" followed by "receiving help from an outside agency" and "the

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[4] Silvia Pettem, *Cold Case Research: Resources for Unidentified, Missing, and Cold Homicide Cases* 9 (CRC Press, 2012). Walton, *supra* note 3; *and see id.* at i (further noting that the two major elements which open opportunities to solve cold case homicides "are changes in technology and changes in relationships that came about through the passage of time").

assignment of different investigators to the case."[5] In a different survey of law enforcement agencies nationwide, the number one and number three reasons attributed for the clearance of cold cases were "new information from witnesses" and "information from new witnesses."[6]

There is simply no way to know when such shifts in relationships will lead to a break in a case. Among the various definitions for a cold case investigation is one "wherein enough time has passed that the perpetrators begin to feel confident enough to speak freely about their involvement [in the crime], *suggestively 5 years or more*."[7]

When changes in relationships do yield new or potentially more probative information, investigators must spend additional time corroborating and testing the reliability of that information. If a witness recants, for example, his or her new stance needs to be fully explored and explained before any further action can be taken. Convincing grounds for the recantation must be verified. Witnesses and suspects must be

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[5] Alexandra Naday, et al., *Analysis of the Cold Case Survey of Law Enforcement for the Colorado Bureau of Investigation* 3 (Colorado State University, Center for Study of Crime and Justice, August 2009).

[6] Davis, et al., *supra* note 2, at 33.

[7] Walton, *supra* note 3, at 19; *and see id.* at iv. (Emphasis added).

re-interviewed.[8] Even when a lead has opened a promising new avenue for investigation, there may remain hundreds or thousands of hours of work before information as to that lead can be made public. Generally, the more time that has passed, the more time that is needed to process the new information and build a case.

It would cripple the ability of a detective to build the relationships needed to develop a narrative strong enough to support a successful prosecution if the State was required to file in court, or otherwise publicly disclose promising leads, within one year after newly developed information initially came forward. It is in part for this reason that this Court has been clear that "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *United States v. Lovasco*, 431 U.S. 783, 791 (1977). In *Lovasco*, the Court reversed the Eighth Circuit Court of Appeals after it affirmed a district court's dismissal of an indictment based on an 17-month delay in bringing the indictment. As the Court recognized, "a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of

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[8] Thomas A. DiBiase, *How to Successfully Investigate and Prosecute a No-body Homicide Case* 8 (March 19, 2010), http://www.nobodycases.com/tips.pdf.

information to evaporate before they are fully exploited." *Id.* at 791-92.

Crime solving can also rely on advances in technology over time. Most obviously, breakthroughs in DNA testing and analysis have changed the landscape of forensic science.[9] But other advancements, for example, in ballistics analysis and fingerprint databases, likewise can create opportunities for hard-to-investigate cases to progress, sometimes to resolution. Even something as relatively minor as the conversion of old files to digital formats, including audio and video files, can create new avenues for detectives.

It is not possible to predict how long it might take to apply new technology to available evidence. The first U.S. conviction based on DNA – of serial killer Terry Spencer – took about a year, from suspicion to conviction.[10] But the person who had been wrongly convicted after falsely confessing to Terry Spencer's crime spent four years incarcerated before he was ultimately pardoned, nearly 6 months after Spencer's conviction.[11] Gaining access to evidence for testing can take years. Backlogs of convicted offender samples and untested evidence, including rape kit

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[9] National Institute of Justice, *Using DNA to Solve Cold Cases* (July 2002), https://www.ncjrs.gov/pdffiles1/nij/194197.pdf.

[10] Rob Warden and Steven A. Drizin, *True Stories of False Confessions* at 277.

[11] *Id.*

samples, have persisted for decades now.[12] Just this year, in Colorado, DNA was used to finally link a suspect to a 1976 murder.[13]

Even if and when developments in technology allow for new analysis of available evidence, that new information must be corroborated and assessed for reliability before it can be used to build a case. It is in part because of how long it can take to crack a hard-to-investigate case that statutes of limitations for the most serious of crimes do not exist. Indeed, because of the increasing potential that technological advances will ultimately help detectives solve difficult to unravel cases, many jurisdictions have extended statutes of limitations for crimes like rape.[14] In some states, law enforcement officers file "John Doe" arrest warrants, which identify only the unique DNA profile

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[12] *See, e.g.*, Brandi Grissom, *Testing State's Huge Backlog of Rape Evidence Kits Comes with Hefty Price Tag*, N.Y. Times (January 3, 2013), http://www.nytimes.com/2013/01/04/us/hefty-cost-to-testing-texas-huge-backlog-of-rape-evidence-kits.html (citing a backlog of over 20,000 untested rape kits in the state of Texas); *see also* National Institute of Justice, *supra* note 9, at 11-12 (discussing convicted offender backlogs and forensic casework backlogs, generally).

[13] Garrison Wells, *Cold Case: Springs Police Link Inmate to 1976 Murder*, The Gazette (January 2, 2013), http://www.gazette.com/articles/springs-149221-colorado-dna.html.

[14] *See* Robert Tanner, *DNA Evidence Fuels Changes on Statutes of Limitations*, The Seattle Times (March 19, 2000), http://community.seattletimes.nwsource.com/archives/?date=20000319&slug=4010782. *See also* National Institute of Justice, *supra* note 9 at 15, discussing extensions and exceptions to statutes of limitations.

obtained from unsolved crime scene evidence, and thereby "commence" a prosecution in order to toll any existing statute of limitations.[15]

Finally, we cannot stress enough the role serendipity plays in the resolution of difficult-to-investigate cases. Retired investigator Carl Craig "*just happened to be*" in the office in September 1999 when a police captain, who had recently encountered the family member of a 1961 homicide victim, casually asked if he knew anything about the 1961 murder.[16] As it happened, Craig was familiar with the case. Craig was able to solve it, almost four decades later, by examining and re-examining the murder weapon, a gun, and bullet fragments, and by interviewing and re-interviewing the suspect, Edward Frieburger, who was convicted in 2002.[17] As one report – which looked at nation-wide survey data and on-site research in four jurisdictions with high volume cold case homicide investigations – explains, "The first observation, and one that surprised us, is that cold case work is usually opportunistic."[18]

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[15] Micah Sucharman, *People v. Robinson: Developments and Problems in the Use of "John Doe" DNA Arrest Warrants*, 99 Calif. L. Rev. 885, 914 (2011).

[16] Walton, *supra* note 3, at 90-94. (Emphasis in original).

[17] *Id.*

[18] Davis, et al., *supra* note 2, at 39.

II. Evidence of Factual Innocence After a Wrongful Conviction is Highly Analogous to More Common Hard-to-Investigate Cases, with the Important Distinction that Detectives and Wrongfully Convicted Inmates have Dramatically Disproportionate Access to Resources.

The law enforcement officer investigating a hard-to-solve case and a wrongfully convicted prisoner trying to demonstrate his actual innocence often share the same goals, starting with the goal of finding evidence which eliminates the wrong suspects – although, obviously, for the wrongfully convicted that means him or herself. Both are often searching for evidence which convincingly identifies the true perpetrator.

The parallels between investigative strategies in the wrongful conviction context are accordingly unsurprising. Indeed, the author of the seminal text on cold-case investigation strategy, Richard H. Walton, writes about how his own introduction to cold case homicide investigation was in connection with his investigation of the wrongful conviction of Jack Ryan, a Native American who served over 40 years in prison and on parole for crimes he did not commit, until then-Govenor Ronald Reagan commuted his sentence to time served in 1969.[19] In 1996, when Ryan was posthumously pardoned, then-Governor

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[19] Walton, *supra* note 3, at Introduction, i.

Pete Wilson, acknowledged that "'Jack Ryan was a young man in the wrong place at the wrong time. He was unjustly railroaded into pleading guilty for crimes he did not commit.'"[20] Walton began his investigation in 1983 and didn't present any evidence to a court until 1989, six years later.[21] In the course of looking for evidence to clear Ryan's name, Walton spent 13 years, poring through newspaper archives files, and records; looking for witnesses or their descendants, and conducting over 400 interviews.[22] "Slowly," he writes of the experience, "the truth – and the coverup – began to emerge."[23]

The wrongfully convicted innocent prisoner shares many of the same obstacles in his or her pursuit of justice as the law enforcement officer trying to untangle a difficult-to-solve case. As the law enforcement officer must often review reams of records and files she did not originally put together to look for clues and missed opportunities, the wrongfully convicted must carefully go through boxes and boxes of the State's files and records, including transcripts of the proceedings against him. In both scenarios the available evidence has to be analyzed;

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[20] *Posthumous Pardon for Unjust Conviction: Man Imprisoned 25 years for Two Murders*, S.F. CHRON. (April 17, 1996), http://www.sfgate.com/news/article/Posthumous-Pardon-For-Unjust-Conviction-Man-2986296.php#ixzz2HFa2NdaP.

[21] *Id.*

[22] Walton, *supra* note 3, at Introduction, i.

[23] *Id.*, at Introduction, ii.

discrepancies in the evidence and variations in statements have to be examined side by side, broken down and tracked. The law enforcement officer and the wrongfully convicted prisoner must then investigate the variations and discrepancies. Often that means going out – or, in the case of the prisoner, getting someone trustworthy and reliable to go out – into the field. In the field, a law enforcement officer, or the prisoner's agent must seek, whenever possible, to bring technological resources to bear on existing evidence; look for new evidence or more evidence; and painstakingly cultivate relationships with information sources. Just as often, it means waiting on people to change, relationships to shift, advances in technology, and on pure serendipity, in order for a new lead to appear, or for a pathway to showing actual innocence to open up.[24] Below we review four examples of cases – several of which undersigned *amici* were directly involved in – that demonstrate how slowly innocence cases unfurl.

The case of Larry Pat Souter is paradigmatic. Souter was wrongly convicted in 1992 for the 1979 murder of Kristy Ringler. In 1997, after years of working from behind bars with family members to try

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[24] *See, e.g., Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000) (noting that barring a habeas petitioner who can demonstrate actual innocence "raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence."

to build his own case of actual innocence, one of the undersigned *amici*, John Smietanka, a former United States Attorney for the Western District of Michigan started working on the case. It took Smietanka and his legal team another 8 years, until 2005, before sufficient evidence of innocence could be amassed to build a case strong enough to result in Souter's release from prison. Ironically, in Souter's case a newly-elected sheriff – who had publicly committed his office to getting to the bottom of unsolved crimes – had rushed a cold case investigation of a 1979 murder to prosecution in 1992. *Souter v. Jones*, 395 F.3d 577, 582 (6th Cir. 2005). In the process, an innocent man was wrongfully convicted.

Souter was the last person seen with Ringler alive, while the two were drinking at a party. *Id.* at 596. Ringler was found in the middle of a road, with her arms to her side, suffering from two head wounds. *Id.* at 581. Souter was convicted largely based on expert testimony that a head wound was caused by a blow from a whiskey bottle that had been used by Souter, and that it was virtually impossible for her head injury to have come from being hit by a vehicle, which was the defense theory of the case. *Id.* at 581-83.

Immediately after his conviction Souter tried to access police files by having his family submit requests under the Freedom of Information Act ("FOIA"). It took five years of FOIA requests before some of the documents in police files which had *not* been turned over before trial were finally released to

Souter. It took several additional years, between his 1992 conviction and 1999, for Souter to collect several affidavits from new witnesses, and former witnesses with different testimony – including from the experts who had testified against him. As the team working on Souter's case found, each time a helpful lead appeared, it took time to corroborate and check out.

Both the district court and the court of appeals agreed that the most recent of the affidavits collected by Souter was not "new evidence," but merely cumulative evidence of innocence, consistent with his defense theory at trial. *Id.* at 587. Both courts decided that Souter was time-barred from raising his constitutional claims. *Id.* at 587-88. However, the appellate panel concluded that, given the "concern about the injustice that results from the conviction of an innocent person [which] has long been at the core of our criminal justice system," Souter's case presented the rare circumstance where evidence of innocence creates an exception to the AEDPA time bar. *Id.* at 601-02 (6th Cir. 2005).

Today, Souter's innocence is beyond cavil. The daughter of the man now believed to have killed Ringler in a vehicular homicide just happened to see a newspaper headline about the Sixth Circuit decision, and noticed the link to the death of Ringler. Although she had also reached out to police back in 1979 – they disregarded her and failed to disclose information about her to Souter's defense team – she immediately reached out to Smietanka's law firm. She reported, again, that she believed her father

had killed Ringler with the side view mirror of his recreational vehicle. This time, however, the facts of her story were all corroborated. As the state Attorney General told the press thereafter, Mr. Souter, "'was done wrong. Thank God it is being corrected.'"[25] Larry Pat Souter has now been fully exonerated, and lives a quiet life in Grand Rapids, Michigan, with his wife Melody. He has worked with the University of Michigan Law School's Innocence Clinic, giving presentations about his case.

Several of the undersigned *amici* – Stanley Lapekas, Gregg McCrary, Larry Smith and James Trainum – also worked on the innocence investigation of Michael Hash, in Culpepper, Virginia. Hash spent 12 years in jail after his conviction, in 2000, of the 1996 murder of Thelma Scroggins. *Hash v. Johnson,* 845 F. Supp. 2d 711 (E.D. Va. 2012). Similar to the Souter case, the sheriff who helped prosecute Hash had been elected on a platform of closing open murder cases.

As the federal district court judge who granted habeas relief found, the prosecution of Hash included "a cavalcade" of misconduct, by prosecutors and police. *Id.* at 749; *see also id.* at 748-53. The new sheriff assigned two detectives to the case; they in turn came across a witness who implicated Hash and two others. *Id.* at 730, 750-51. This witness had lied

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[25] John Agar, *Murder suspect 'was done wrong'; Attorney general says Larry Souter never should have been brought to trial*, The Grand Rapids Press, July 6, 2005, at A1.

several times to investigators, and in fact she failed a polygraph test, but one of the three people she implicated confessed; he also failed a polygraph test, but the State failed to disclose either failed polygraph to the defense. *Id.* at 723. The man who confessed was further coached into testifying against Hash and his remaining co-defendant. *Id.* at 718, 730, 750-51. While Hash's co-defendant was acquitted at trial, a jail-house snitch also testified against Hash, claiming Hash had confessed to him. *Id.* at 718-719. The State falsely denied at trial that they had purposefully housed Hash with the known snitch, and falsely denied at trial that any deal had been negotiated with him. *Id.* at 722, 748.

The investigation of Hash's innocence case took 10 years. Relying on their decades of experience and crime scene analysis abilities, the involved undersigned *amici* were able to show how far off the witnesses against Hash were from the actual facts of the crime. They were also able to build relationships of trust which led to testimony as to Hash's innocence. The co-defendant who confessed fully recanted, admitting that all of the details he had shared about the murder he had gotten from the law enforcement officers interrogating him; the federal district court judge found several markers of reliability in that recantation, including that one police investigator admitted in the federal proceeding that he may have given the co-defendant information. *Id.* at 723, 730-31. Indeed, even after the federal habeas petition was filed, more evidence of innocence was uncovered by discovery ordered by the district court, including

evidence of the deals offered to the witnesses against Hash. *Id.* at 722-23, 747. Finally, investigators were also able to develop compelling evidence that another perpetrator had actually committed the crime. *Id.* at 731-32.

In light of Hash's strong showing of innocence, the federal district court rejected the state's challenges to certain of Hash's federal habeas claims based on exhaustion and timeliness. *Id.* at 728-35. As the district court judge concluded: "Having reviewed the voluminous record in this case, the Court is disturbed by the miscarriage of justice that occurred in this case and finds that Hash's trial is an example of an 'extreme malfunction[ ] in the state criminal justice system[ ].'" *Id.* at 752. After this grant of relief, Fairfax County appointed a special prosecutor who went over the record in the case and spent five months interviewing 40 witnesses in connection with the murder.[26] As he stated to the press, "'[i]n fairness to Hash, it is time to release him. He is now presumed innocent and a totally free individual.'"[27] Today, Michael Hash, at 33 years old, is looking for

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[26] Donnie Johnston, *Charges against Michael Hash Nolle Prossed*, The Free Lance-Star (August 20, 2012), http://news.fredericksburg.com/newsdesk/2012/08/20/charges-against-michael-hash-nolle-prossed/; *see also* Susan Svrluga, *Va. Man Michael Wayne Hash has Murder Charges Dismissed After 12 Years in Prison*, The Washington Post (August 20, 2012), http://articles.washingtonpost.com/2012-08-20/lifestyle/35491921_1_murder-charges-capital-murder-key-witness.

[27] *Id.*

employment and trying to catch up on all that happened in the world while he was behind bars.

The very recently decided Eastern District of New York case of William Lopez is instructive. Lopez's federal habeas petition was initially dismissed in 2002 as out of time. However the merits of his claim were ultimately heard because of the strong innocence case which took Lopez well over 15 years to build. *Lopez v. Miller*, No. 02-CV-3988, 2013 U.S. Dist. LEXIS 7262, *34-35 (E.D.N.Y. Jan. 16, 2013). Among the undersigned, Joseph Dwyer is a former New York police detective who helped investigate Lopez's innocence case.

Lopez was convicted in 1990 of the 1989 shooting of an alleged drug dealer. The state's incriminating evidence consisted only of an eyewitness who failed to recognize Lopez in the courtroom – she in fact described the shooter as a "dark black" man when Lopez was obviously light-skinned – and a witness who was on a two-day crack binge at the time of the crime, whose testimony changed during trial from saying she had not seen the shooting, but saw Lopez with a gun, to saying she had seen Lopez shoot the victim. *Id.* at *2-3. In 1993, the intermediate state appellate court affirmed the lower court's denial of Mr. Lopez's appeal. *Id.* at *34-35. In 1999, Lopez filed a *pro se* motion in the state's highest appellate court for review, but the motion was denied in 2000 as out of time. *Id.* In 2005, recognizing that the Second Circuit had instructed district courts only to consider the question of whether "the Constitution requires an

actual innocence exception to AEDPA's limitation period" if a colorable case of innocence was presented, the district court granted reconsideration of the dismissal of Lopez's habeas petition, and appointed counsel. *Id.* at *36-37.

At the time, Lopez's evidence consisted of three affidavits he had secured from the witness who claimed to have seen him shoot the victim, in the months after his sentencing in 1991, and two alibi affidavits from the mother and sister of his former common law wife, which he had acquired in 2005. *Id.* at *32, *59. In each of the three recantation affidavits, the witness against Lopez maintained she had falsely testified at trial and that Lopez was not at the crime scene. *Id.* at *66-83. Both of the 2005 affiants stated that Lopez was with them around the time of the commission of the crime, and therefore could not be the perpetrator. *Id.* at *99-103.

The district court directed appointed counsel to hire an investigator to locate the recanting witness, who had disappeared. *Id.* at *36-37. It took the investigator four years to learn the witness had died. *Lopez v. Miller*, 02-CV-3988 (E.D.N.Y.), Doc. No. 359-5, p. 21 of 354. After that investigation was complete, Lopez sought and got a stay to exhaust his state court remedies; his state court motion for a vacatur was denied, and his claims were exhausted in 2011. *Lopez*, U.S. Dist. LEXIS 7262 at *37-38. Back in federal court, Lopez asked for a federal evidentiary hearing on his innocence claim. He got not one but two; the first was reopened because, among other helpful

discoveries, investigators had finally found another eyewitness to the crime who was a close friend of the victim, and who testified he was certain Lopez was not the shooter, and that the shooter was black and dark-skinned. *Id.* at *46-48.

Given this evidence, and the affidavits Lopez had collected on his own back in 1991 and 2005, the district court considered the merits of Lopez's claim for ineffective assistance and granted relief. The district court found that the result of trial counsel's failure to investigate alibi witnesses was that: "a likely innocent man has been in prison for over twenty-three years. He should be released with the State's apology." *Id.* at 152. The State of New York has been ordered to take substantial steps to retry within 60 days of the date of the district court order, January 16, 2013, or to release Lopez. *Id.*

Finally, the well-documented case of the so-called "Central Park Five" is also instructive. In that case, five teenaged boys were wrongfully convicted after each had falsely confessed to participating in the rape and near-murder of Tricia Meilli, a jogger in Central Park. Kharey Wise, Kevin Richardson, Antron McCray, Yusef Salaam and Raymond Santana were convicted after trials in 1990. Although each had asserted innocence at trial, after several years of trying to find evidence which could prove innocence, the possibility of exoneration seemed hopeless. By sheer happenstance, however, the actual perpetrator of the crimes, Matias Reyes, had a brief encounter with one of the five in prison. Coming face to face

with one of the men he knew had been wrongfully convicted compelled Reyes to confess in January 2002 that he alone committed the crimes against Meilli. All but one of the wrongfully convicted men had by this time already finished serving their sentences.

In light of Reyes' confession, law enforcement officers spent several months working on finding corroborating evidence that Reyes acted alone in attacking Meilli. Ultimately, the state of New York did not oppose the motions to set aside the convictions of McCray, Wise, Salaam, Richardson and Santana after investigators concluded that "Reyes' account of the attack and rape is corroborated by, consistent with, or explanatory of objective, independent evidence," including DNA evidence that was retested and found to inculpate Reyes and exculpate the five wrongly convicted. *New York v. Wise, et al.*, 194 Misc.2d 481, 489 (New York County 2002). The five were freed in December of 2002. It is important to note that, after Reyes' confession much of what ultimately amounted to the evidence of innocence for McCray, Wise, Salaam, Richardson and Santana was found and dug up in an exhaustive reinvestigation of the crime by prosecutors and law enforcement officers. What took several months for these well-trained, experienced officers – who had access to databases, and subpoena power that even criminal defense investigators cannot access, much less a layperson – to corroborate could have easily taken an inmate several years to do alone.

* * *

While both the law enforcement officer and the wrongfully convicted person seeking to demonstrate innocence may share the goals of eliminating the wrong suspects, and identifying the true perpetrator, there are two major differences in their circumstances.

Most importantly, law enforcement has much greater access to resources than the wrongfully convicted prisoner, who almost always remains incarcerated, even as he or she investigates innocence. Detectives have freedom of movement; access to powerful but confidential local and national databases; access to legal consultations and the power of the grand jury and the subpoena. While law enforcement agencies everywhere are cash strapped, there is at least limited funding allocated to especially hard to solve cases. And detectives can draw on institutional knowledge, and their professional training and experiences. These resources enable detectives to chase down leads, and allow them to make informed judgments about when waiting is the most diligent strategy they can pursue.

None of these resources are readily available to an incarcerated person trying to uncover persuasive evidence of his or her innocence. The wrongfully convicted prisoner has limited, if any, access to legal advice and no institutional support for his quest. He has no training or experience to draw on, and the scenario he faces – needing to prove innocence in the face of a record that had been strong enough to result in his conviction – is so rare that there is no road map

to follow. Although he faces many of the same challenges law enforcement officers working hard-to-investigate crimes face, it would be a pure legal fiction to pretend those obstacles are as surmountable for the wrongfully convicted innocent person.

Apart from the considerable work of finding and developing evidence of actual innocence, the wrongfully convicted person inevitably faces the additional burden of needing to first isolate and identify where the original investigation, prosecution and/or judicial review of his case failed, so as to explain how it was he came to be wrongfully accused, prosecuted and convicted. Again, his or her access to resources, including funds and legal counsel, is limited. Moreover, as to the prisoner seeking to build a case of wrongful conviction, and the law enforcement officer seeking to build a prosecutable case for conviction, the issues with respect to timing are often the same.

As discussed, a detective trying to crack a hard to solve homicide uses time as an ally: he or she waits for the right relationships to change or develop; for technology to become more available or more useful; or for serendipity to strike to his or her advantage. As this Court recognized in *Lovasco,* if deadlines forced law enforcement officers to prematurely push a case toward prosecution, years, even decades, of hard, painstaking work could be entirely undermined. Premature disclosure of evidence and information could shut down important avenues of corroboration. If not properly interpreted and assessed for reliability, new evidence, or newly analyzed evidence, could

prove misleading, or inaccurate, wasting resources and discrediting aspects of an otherwise robust investigation. The law enforcement officer working up a case for prosecution accordingly relies heavily on his or her judgment with respect to the issue of timing – there are simply no textbook answers for the prisoner to look up on the questions of when it is advisable to wait for more evidence, and for how long; when an investigator should continue knocking on a door for an interview, or work instead on building a relationship of trust; or when to make the call that a case is strong enough to bring to the grand jury, or to trial, or to wait.

However, with respect to constitutional claims asserted without gateway evidence of innocence, AEDPA's "new evidence" provision clearly limits the time for filing a habeas petition to one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The Court now considers whether there is an exception to this provision of AEDPA when a petitioner can demonstrate a credible claim of actual innocence and, if so, whether an inmate with a credible claim of innocence must show that he has diligently pursued his rights.

Our experience with hard-to-investigate crimes compels our conclusion that it would be impractical and inequitable to impose a time limit on coming forward with evidence of actual innocence, or to require a legal showing of diligence. With little to no

resources, and given the need to connect a showing of actual innocence to a cognizable constitutional claim for habeas relief, a factually innocent prisoner already has the odds stacked against him. Finding and substantiating leads on his innocence, and building that information up to the point where the evidence can stand up in court, will most likely take the wrongfully convicted person even more time and luck than it takes law enforcement to crack especially difficult-to-solve cases. Moreover, an innocent prisoner looking for the true perpetrator of the crime for which he is incarcerated is unlikely to have the same judgment regarding questions of timing as trained law enforcement professionals.

As discussed, many jurisdictions have no statute of limitations on major crimes, or have extended the statute of limitations to accommodate advances in investigative strategies and technologies that may make new information available. The rationale for doing so is to bring closure to the victims by proving beyond doubt that the true perpetrator has been brought to justice, and to safeguard society by restraining the true perpetrator from striking again. Imposing what amounts to a statute of limitations on evidence of innocence contravenes these objectives, and would perpetuate the injustice that cold case units are dedicated to preventing. For these reasons, we believe "[w]e need to work just as hard to exonerate the innocent as we do to convict the guilty," and we now urge the Court to consider that there is no

practical or fair way to put time and diligence constraints on such efforts.[28]

CONCLUSION

We believe that the Sixth Circuit decision below should be affirmed by this Court.

Respectfully submitted,

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[28] Walton, *supra* note 3, at Introduction, iv.

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v.

FLOYD PERKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 66 current members of the Innocence Network have represented hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, the Netherlands, and New Zealand. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons learned from cases in which the system convicted innocent persons, the Innocence Network advocates reforms designed to enhance the truth-seeking functions of the criminal justice system and thereby prevent future wrongful convictions.

SUMMARY OF ARGUMENT

The actual-innocence gateway serves as a critical safety valve, protecting against the incarceration and execution of innocent persons. The gateway reflects "the fundamental value determination of our society that it is far worse to convict an innocent man than to

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. In compliance with Rule 37.3, the written consent of all parties accompanies this brief.

let a guilty man go free." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). The Court should affirm the Sixth Circuit's judgment recognizing that the one-year limitations period of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") incorporates the actual-innocence gateway. Congress could have, but did not, preclude application of the actual-innocence gateway to time-related defaults when enacting AEDPA. Congress's failure to exclude the doctrine's application to AEDPA requires continued application of the crucial actual-innocence gateway. As the cases discussed below demonstrate, innocent people will remain incarcerated unless the Court recognizes the continued vitality of the gateway.

Further, no diligence requirement should be imposed on a petitioner seeking to invoke the innocence gateway. The Innocence Network's experience in numerous innocence investigations confirms that investigating a claim of innocence is a time-intensive process fraught with difficulties and often turns on fortuity rather than diligence alone. Imposing a diligence requirement would deprive some actually innocent petitioners of the opportunity to establish their innocence.

Petitioners frequently conduct investigations from within the confines of prison, often with little outside assistance from counsel or even an investigator, and with deficient or inaccessible prison law libraries. Many petitioners are also mentally disabled or lack education or literacy, making it all the more challenging to conduct a thorough and timely investigation. It is not practicable to require

diligence to satisfy the innocence gateway: many petitioners face insurmountable obstacles to systematically unearthing critical exculpatory facts. When there are facts demonstrating innocence, the federal courts' doors should be open.

Affirming the continued availability of the actual-innocence gateway would not inundate the courts with habeas petitions. Contrary to popular belief, studies show that prisoners do not commonly assert their actual innocence. The stringent standards required to meet the actual-innocence threshold will continue to deter frivolous innocence claims or permit them to be dealt with quickly and efficiently by the district courts. Further, habeas petitioners have no incentive to delay in asserting actual innocence, but instead, have every incentive to seek habeas relief as expeditiously as possible. Allowing habeas petitions beyond AEDPA's statute of limitations where the petitioner makes a showing of actual innocence will not change that. Any delay in presenting evidence of innocence can be taken into account in evaluating the weight of that evidence when determining whether the *Schlup* standard has been met. If, however, habeas petitioners claiming actual innocence are held to AEDPA's statute of limitations, then courts will undoubtedly see prematurely filed petitions that are not yet fully investigated, filed to avoid missing the one-year deadline.

Finally, clemency is not the solution. Clemency is largely within the discretion of elected officials, and thus often dictated by the political climate, and its exercise has declined precipitously in recent decades. Clemency does not provide a fail-safe if an actually innocent petitioner's federal habeas claim is barred.

ARGUMENT

I. Protecting the Actually Innocent from Unjust Incarceration or Execution Is a Paramount Goal of the Criminal Justice System.

The questions presented in this case must be evaluated in light of the crucial and fundamental importance of protecting actually innocent people from unjust incarceration or execution. "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[2] *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). As this Court has recognized, an innocent person has a "powerful and legitimate interest" in obtaining release from incarceration. *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986); *Schlup*, 513 U.S. at 324 ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence."). This individual interest is reflected in our society's "fundamental value determination . . . that it is far worse to convict an innocent man than to let a guilty man go free." *Schlup*, 513 U.S. at 324 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

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[2] *See* Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101, 2138 (2002) ("[E]ven those gravely concerned about conservation of judicial resources have acknowledged that the 'policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.'") (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)).

The actual-innocence gateway ensures that a miscarriage of justice does not occur in the "extremely rare" but crucial cases in which a prisoner demonstrates actual innocence. *Id.*

Cases decided after the passage of the AEDPA, including *House v. Bell*, have reaffirmed that the *Schlup* gateway applies to procedural defaults not expressly addressed by Congress. *See* 547 U.S. 518, 536 (2006). This is because procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

A. This Court Has Long Relied on Equitable Principles in Habeas Proceedings To Prevent Unjust Incarceration.

Considerations of fundamental fairness have long governed the writ's vital role in preventing unjust incarceration. *See, e.g.*, *Kuhlmann*, 477 U.S. at 447 ("[H]abeas corpus has traditionally been regarded as governed by equitable principles.") (internal quotation omitted). The use of habeas corpus to secure relief from wrongful confinement was "an integral part of our common-law heritage" by the time the Colonies achieved independence. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). Likewise, in early decisions, this Court embraced the common-law principle that habeas preserves individual liberty against unjust restraints. *See, e.g.*, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

Modern decisions of this Court have preserved "the 'equitable discretion' of habeas courts to see that

federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (citation omitted). In *Murray v. Carrier*, for example, the Court held that to avoid a "miscarriage of justice," "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [state-law] procedural default." 477 U.S. 478, 495-96 (1986). Similarly, in *McCleskey v. Zant*, the Court provided an innocence safety valve for the cause-and-prejudice standard, explaining: "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty . . . ." 499 U.S. 467, 495 (1991) (citation omitted).

In *Schlup v. Delo*, decided shortly before the passage of AEDPA, the Court held that actual innocence may excuse procedural errors where equity so demands, describing an actual-innocence showing as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404).

B. This Court Continued This Equitable Tradition in *House*, Holding That the Actual-Innocence Gateway Survived the Passage of AEDPA.

Although aware of *Schlup* when enacting AEDPA, Congress did not preclude the application of the

actual-innocence gateway to time-related defaults, and its silence should not be construed as rejecting the equitable principles traditionally governing the writ. *See Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (improper to "construe a statute to displace courts' traditional equitable authority absent the 'clearest command'"). Nor did Congress prohibit use of the courts' equitable authority to excuse a procedural default when faced with a strong actual-innocence showing.

House, issued after AEDPA's enactment, emphasizes the actual-innocence gateway's continuing vitality. House's habeas petitions were denied, in part, because he had waived his arguments under state law. 547 U.S. at 534-35. This Court held that although federal habeas relief is generally not available for "claims forfeited under state law," "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration" in extraordinary circumstances. *Id.* at 536 (internal quotation omitted).

Most importantly here, *House* considered and rejected the argument that AEDPA superseded the *Schlup* actual-innocence gateway. Congress expressed no intent to overturn the *Schlup* standard for a procedural default for first habeas petitions. Indeed, *House*'s reasoning applies with even greater force here because the procedural default at issue—failure to comply with AEDPA's statute of limitations—is solely a federal procedural requirement.

As the Court has recognized, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the

protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). The cases discussed in section I.C below demonstrate the critical importance of the actual-innocence gateway in providing relief to actually innocent prisoners.

C. Actually Innocent People Would Have Languished in Prison Without an Actual-Innocence Gateway to AEDPA's Statute of Limitations.

Real-world cases demonstrate the importance of the miscarriage-of-justice exception in protecting actually innocent people from unjust incarceration.[3] In the following cases in which the petitioner was actually innocent, AEDPA's statute of limitations—without the actual-innocence gateway—would have barred petitioners' federal habeas claims.

1. José Garcia

On July 16, 1991, Cesar Vasquez was shot to death in the Bronx. José Garcia was tried for the murder. The only testifying eyewitness claimed that she had seen Garcia at the scene of the murder from her fourth-floor window. A jury convicted Garcia of second-degree murder, and he was sentenced to 25 years to life in prison.

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[3] Although these are not capital cases, the concern is even more grave when the petitioner may be executed.

Garcia maintained his innocence throughout the proceedings: he was in jail in the Dominican Republic until the afternoon of July 16, and he had remained there for several weeks before returning to the United States. Garcia's lawyer had put on virtually no evidence of this alibi at trial, other than the testimony of the victim's sister who admitted on cross-examination that she had no personal knowledge of where Garcia was at the time of her brother's murder. The prosecution was likewise aware of Garcia's alibi, but made little attempt to investigate it.

Garcia's repeated efforts to pursue relief in state court failed: New York courts denied his direct appeal, his attempts to seek a writ of error *coram nobis*, and his motion to vacate his conviction. Many of his efforts were undertaken pro se. Garcia also had a limited command of English. He filed a federal habeas corpus petition in 2002, which the prosecution moved to dismiss as barred by AEDPA's one-year statute of limitations. The magistrate judge issued a Report and Recommendation recommending that Garcia's petition be dismissed because it was not filed within the limitations period.

The district court found that Garcia's petition was, in fact, filed after the one-year statute of limitations had expired. *Garcia v. Portuondo*, 334 F. Supp. 2d 446, 450 (S.D.N.Y. 2004). Nevertheless, the court held that Garcia's credible claim of actual innocence provided an exception to the limitations period, and Garcia's otherwise-barred petition could

proceed.[4] *Id.* at 462 ("[T]his Court holds that the running of the AEDPA statute of limitations is equitably tolled in the exceedingly rare case in which the petitioner makes out a credible claim of actual innocence. This is such a case.").

Garcia received an evidentiary hearing on his petition. At this hearing, Garcia's trial counsel testified that he believed that Garcia was in the Dominican Republic at the time of the killing, but he had not prepared or investigated this defense because he believed the prosecution's case was weak, he had limited time and money to investigate, he thought any witnesses might not be credible, and he had doubts about the admissibility of documents from the Dominican Republic. Garcia's habeas counsel, on the other hand, conducted a thorough investigation—including investigating in the Dominican Republic—and located a number of documents establishing that Garcia was in the Dominican Republic until shortly before Vasquez's murder. All of these documents existed at the time of trial, but Garcia's trial counsel had not attempted to find them. Garcia's habeas counsel also put on the testimony of numerous witnesses who testified that Garcia was in the Dominican Republic on the night of Vasquez's murder, as well as witness affidavits confirming that Garcia was still in the Dominican Republic a few days after the murder. *See generally Garcia v. Portuondo*, 459 F. Supp. 2d 267, 271-78, 287-89 (S.D.N.Y. 2006); Matthew Bosher, *The 'Exceptionally*

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[4] The district court found that Garcia had been diligent in pursuing his actual-innocence claim. 334 F. Supp. 2d at 452.

Troubling' Murder Conviction of Jose Garcia, 2 Am. U. Crim. L. Brief 16, 16-18 (2007).

Based on this evidence, the district court granted Garcia's habeas petition and ordered the state to release or re-try him. 459 F. Supp. 2d at 295. The prosecution dismissed the charges against Garcia, and he was released from prison in February 2007, nearly 16 years after he was arrested for a murder that took place while he was roughly 1,500 miles from the scene of the crime. After Garcia's exoneration, the prosecution's star witness confessed that she had lied under oath when she identified Garcia at trial to protect her son, who had been threatened by police after he witnessed the murder but refused to cooperate with investigators.[5]

The evidence that ultimately exonerated José Garcia came to light through a patchwork of fortunate events: Garcia's trial counsel agreed to testify at his evidentiary hearing, the district court appointed habeas counsel with the resources to conduct an investigation in the Dominican Republic, and documents created more than a decade earlier in

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[5] For background on Garcia's case, see generally Douglas Montero, *Cancer Victim Reveals Secret that Jailed Innocent Men*, New York Post, Nov. 21, 2011, *available at* http://www.nypost.com/p/news/local/bronx/dying_to_tell_truth_ZLw3NZNFjv8V4yn9jCeLuL; Matthew Bosher, *The 'Exceptionally Troubling' Murder Conviction of Jose Garcia*, 2 Am. U. Crim. L. Br. 16 (2007); Maurice Possley, National Registry of Exonerations, *Jose Garcia*, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3835; *Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006); *Garcia v. Portuondo*, 334 F. Supp. 2d 446 (S.D.N.Y. 2004).

a foreign county still existed at the time of his hearing. But perhaps the most significant event in Garcia's story took place when the district court held that Garcia's otherwise-barred habeas petition could be filed outside AEDPA's one-year limitations period because of the actual-innocence gateway. Had Garcia's petition been barred by limitations, he might very well still be in prison today for a murder he did not commit.

2. Bruce Lisker

In March 1983, Dorka Lisker was beaten and stabbed to death in her Los Angeles home. Her 17-year-old son, Bruce Lisker ("Lisker"), found the body and called paramedics. Lisker was tried for the murder in California court. He was convicted of second-degree murder in 1985 and was sentenced to 16 years to life in prison.

The California appellate courts upheld Lisker's conviction, and the California Supreme Court denied habeas relief in 1989. Fourteen years later he unsuccessfully sought collateral review again in California state court. He filed a habeas corpus petition in federal court in 2004. The district court, adopting the magistrate judge's Report and Recommendation, found that the AEDPA statute of limitations expired in 1997—nearly seven years before Lisker filed his federal habeas petition. *Lisker v. Knowles*, 463 F. Supp. 2d 1008, 1009, 1011-12 (C.D. Cal. 2006). Nevertheless, the court permitted Lisker's petition to go forward, holding that the *Schlup* gateway tolls the limitations period upon a

credible showing of actual innocence, and that Lisker had made the required showing. *Id.* at 1038-42.

In so finding, the court reviewed evidence uncovered after Lisker's conviction. This evidence was presented at an evidentiary hearing at which "the case the prosecution presented at trial" was "effectively dismantled." *Id.* at 1018. For example, the prosecution contended that Lisker had lied to police about being able to see his mother's body from outside the house, despite photographic evidence that supposedly demonstrated that Lisker could not have seen through the windows on account of glare. But evidence at the hearing showed that Lisker indeed could have seen his mother's body through the windows of her house, and the photographic evidence presented at trial did not accurately depict the glare on the windows at the relevant time. Indeed, the prosecutor at trial had not visited the murder scene before the trial, but when he visited the scene in 2005 he was shocked to find that from outside the house he could see the location where Lisker's mother was found. *Id.* at 1019-22.

Numerous other aspects of the prosecution's case against Lisker unraveled at the hearing. The prosecution had contended that shoeprints at the scene demonstrated that Lisker was the only other person in the house around the time of the killing. But at the hearing Lisker presented the 2004 analysis of an experienced LAPD criminalist who concluded that certain footprints at the scene—including at least one bloody shoeprint found inside the house—could not have been made by Lisker's shoes. In fact, the evidence presented suggested that

an impression on the victim's head may have matched this other shoeprint. *Id.* at 1022-24.

Moreover, the prosecution had argued at trial that a motive for Lisker to kill his mother was to steal money from her purse, but much of the money that Lisker had supposedly stolen was later discovered by a court clerk to have remained in her purse all along. *See id.* at 1018, 1025. The prosecution's closing argument drew attention to the absence of evidence suggesting another legitimate suspect, but in fact there was another likely suspect with a violent criminal past who had lied to police about where he was on the day of the killing, admitted to being at Lisker's mother's home the day before the murder, and may have made a phone call from the home on the day of the murder. *Id.* at 1018, 1027-28. Additional examples of evidence presented at trial were significantly undermined at the hearing. Some of this evidence had been uncovered by a private investigator hired by Lisker; some was found through an intensive investigation into the case by the *Los Angeles Times*.

Based on this evidence, the court permitted Lisker to pass through the *Schlup* gateway and present his petition, which otherwise would have been barred by the AEDPA statute of limitations. In August 2009, the court granted his habeas petition and ordered the state to re-try or release him. *See Lisker v. Knowles*, 651 F. Supp. 2d 1097, 1101, 1141 (C.D. Cal. 2009). The next month, prosecutors dropped the charges against Lisker for lack of evidence. Bruce Lisker,

who had been imprisoned when he was 17 years old, left prison as a 44-year-old man.[6]

3. Larry Pat Souter

In August 1979, Kristy Ringler was found lying unconscious on a highway in Michigan, with a small pool of blood beneath her head. *Souter v. Jones*, 395 F.3d 577, 581 (6th Cir. 2005). The autopsy revealed that Ringler died of brain injury caused by two head lacerations. *Id.* A forensic pathologist believed that Ringler's injuries were consistent with being struck by a car.

Ringler had recently left a party, where she was last seen by Larry Pat Souter. Souter had been heavily drinking whiskey the night of Ringler's death. Souter discarded the whiskey bottle when he and other partygoers got word of Ringler's accident

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[6] For background on Lisker's case, see generally Scott Glover & Matt Lait, *A Case of Doubt: New Light on a Distant Verdict*, Los Angeles Times, May 22, 2005, *available at* http://www.latimes.com/news/local/la-me-lisker22may22,0,5660396,full.story; Scott Glover & Matt Lait, *Lisker Files Suit Alleging He Was Framed: Man Wrongly Imprisoned for 26 Years in the Death of His Mother Says LAPD Violated his Rights*, Los Angeles Times, Dec. 23, 2009, at A8; Matt Lait, *After 26 Years, Bail for Lisker*, Los Angeles Times, Aug. 12, 2009, at A8; Scott Glover & Matt Lait, *A Sentence, and Hopes, are Lifted in '83 Killing*, Los Angeles Times, Aug. 8, 2009, at A1; Charles Armbrust, National Registry of Exonerations, *Bruce Lisker*, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3386; *Lisker v. Knowles*, 463 F. Supp. 2d 1008 (C.D. Cal. 2006); *Lisker v. Knowles*, 651 F. Supp. 2d 1097 (C.D. Cal. 2009).

and walked to the scene. *Id.* The police subsequently recovered the discarded liquor bottle.

Police investigated Souter, but Souter denied any involvement in Ringler's death. *Id.* Police did not find any blood on Souter, with the exception of a trace of blood on the label of the liquor bottle, which matched both Souter's and Ringler's blood type. Souter explained that he had cut his finger on a door handle at the party. *Id.* at 582. The prosecutor declined to press charges. *Id.*

In 1983, a detective and the medical examiner reconsidered the case and hypothesized that the liquor bottle might have been used to kill Ringler. *Id.* The prosecutor again declined to bring charges against Souter. *Id.*

In 1991—more than a decade after Ringler's death—a new sheriff reviewed the evidence and issued an arrest warrant for Souter. *Id.* at 582-83. A jury convicted Souter of second-degree murder in 1992. *Id.* at 583. After filing an unsuccessful motion for new trial, Souter filed a habeas petition in the United States District Court for the Western District of Michigan. *Id.* Souter based his petition on several pieces of new evidence, including testimony that the liquor bottle would not have had a sharp edge in 1979, new photographs of the victim that contradicted the prosecution's theory, and recantations from two of the prosecution's witnesses. *Id.* at 583-84. The district court found Souter's habeas petition untimely, and therefore barred. *Id.* at 584. In 2005, the Court of Appeals reversed, holding that Souter's new evidence established a credible claim of actual innocence. *Id.* at 590, 597.

While Souter's case is an example of the critical need for the actual-innocence gateway, it is also an example of how evidence can be discovered by fortuity. *See infra*, Section II.A. Evidence uncovered after the Court of Appeals granted Souter's habeas petition conclusively established that another person—not Souter—was responsible for Ringler's death.

At that time, Carla Dimkoff—a person with no involvement in the case—saw a news report about the case. She contacted Souter's attorney to disclose that she believed that her father, James Keller, was responsible for Ringler's death. Further investigation confirmed that Souter was not accountable; instead, Dimkoff's father, who had been drinking, killed Ringler by hitting her with the side-mirror of his motor home. Only after Souter's attorney pursued Dimkoff's story did state officials finally acknowledge that Souter was innocent.[7]

II. Investigating Claims of Actual Innocence Is a Slow, Uncertain, and Sometimes Haphazard Process.

Innocence investigations rarely follow a linear path and are often marked by false starts, dead ends, and serendipitous "breaks" in the case that lead to exonerating evidence, sometimes many years after conviction. The experience of the Innocence Network and its affiliate Innocence Projects belies the notion that requiring diligence would result in meritorious

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[7] For a recounting of the exonerating evidence, see Jordan M. Barry, *Prosecuting The Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 Stan. L. Rev. 535, 558-59 (2012).

petitions being filed sooner. Innocence investigations are qualitatively different from the preparation that precedes the average habeas petition. Such investigations unfold in their own time, as they require an incarcerated individual to pursue evidence outside both the record and the prison walls. Squeezing these investigations into a tight limitations period does not serve the traditional role of habeas corpus in preventing unjust incarceration. Forcing innocence investigations to conclude prematurely, whether by rejecting the *Schlup* gateway or grafting onto existing equitable doctrines a new diligence requirement that does not reflect the realities of investigating from prison, not only creates incentives for petitioners to file premature petitions, but may also pretermit avenues of investigation that could result in conclusively exonerating evidence. And, most fundamentally, failure to recognize an exception or saddling the exception with a diligence requirement unquestionably could result in actually innocent prisoners being denied federal habeas relief, even if they would otherwise have been able to adduce compelling evidence of innocence.

It is a fallacy to believe that exonerating evidence can be discovered more quickly if the petitioner exercises diligence. Critical evidence needed by a petitioner is, not uncommonly, the product of fortuity. *See* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2051 n.84 (2000) (describing "the huge element of luck characterizing the discovery of many miscarriages of justice" and providing examples); Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?,"* 86 Judicature 83, 84 (2002) (concluding that 10 of 13

exonerations studied resulted from "fortuities"); Edwin M. Borchard, *Convicting the Innocent: Errors of the Criminal Justice System* xix (1932) (collecting cases in which evidence of innocence discovered by "sheer luck").

Below is a small representative sampling of individuals who were convicted of crimes, with the stories of the investigations, and the fortuities, that ultimately proved their actual innocence.

A. Exonerating Evidence Is Often Discovered Serendipitously, Regardless of Whether the Petitioner Has Been Diligent.

1. Clarence Elkins

In June 1999, Clarence Elkins was convicted of murdering and raping his mother-in-law and of raping and attempting to murder his six-year-old niece. Elkins proclaimed his innocence immediately and consistently. It would take nearly eight years, however, before DNA evidence conclusively exonerated Elkins by establishing that another man had committed the heinous crimes for which Elkins was convicted.

Although no physical evidence connected Elkins to the crime, an Ohio jury convicted him based largely on the testimony of his six-year-old niece who had identified him as the perpetrator. After the attacks in which his niece was rendered unconscious and her grandmother was murdered, his niece fled her grandmother's home and went to the nearby home of three neighborhood playmates. The girls' mother

testified that when she answered the door, the girl said: "My Uncle Clarence killed my grandma."

Although Elkins's niece recanted her testimony in May 2002, the state court dismissed Elkins's motion for new trial or evidentiary hearing, concluding that the child's recantation was not credible.

Elkins's wife, convinced he was innocent of killing her mother and raping her niece, continued to pursue a long and difficult investigation. The investigation was marked by false starts and dead-ends as well as serendipitous events that led to the discovery of the evidence that ultimately exonerated Elkins. For example, Mrs. Elkins knew that her mother had repeatedly rebuffed the advances of an emotionally disturbed man 30 years her junior and suspected this young man might have committed the crimes. In 2002, while still pursuing evidence to link this younger man to the crimes, she was shocked to read in the *Akron Daily Journal* that Earl Mann—the common-law husband of her mother's neighbor (the very woman to whom her niece had gone after the attacks)—had been convicted of raping the three young girls who had been her nieces' playmates. Although this news report raised grave questions, Mrs. Elkins continued to attempt to determine whether the younger man was involved. The younger man agreed to have his DNA compared to DNA from the crime scene, but the necessary DNA tests, more sophisticated than the DNA evidence presented at trial, would cost between $30,000 and $50,000, a sum Mrs. Elkins did not have.

The Ohio Innocence Project/Rosenthal Institute for Justice at the University of Cincinnati became involved in the case in 2004. Mark Godsey, cofounder

of the Ohio Innocence Project, negotiated a steep discount on the DNA testing. That testing excluded Elkins but also excluded the younger suspect. An Ohio state court denied Elkins's motion for new trial based on this evidence, concluding that the jury would have convicted Elkins even if it had had the new DNA evidence. At that time, Elkins's team did not have DNA from Earl Mann.

Then, in 2005, in "an amazing coincidence," Mann was transferred to the prison in which Elkins was serving his term, and indeed to his very cell block. Ultimately, Elkins was able to collect one of Mann's cigarette butts and get it to his wife so a DNA sample could be taken. Sophisticated DNA testing proved that Mann's DNA matched that of hair and fluid collected from the crime scene. The county prosecutor, however, dismissed this DNA testing as not conclusive because it could have resulted from DNA "skin-cell transfer." Only after Ohio Attorney General Jim Petro became involved in the case in September 2005 did Elkins finally obtain the relief he had sought—in December 2005, the County Prosecutor filed a motion to dismiss all charges against Elkins.[8]

2. Jonathan Moore

In 2002, an Illinois jury convicted Jonathan Moore of first-degree murder, along with counts of

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[8] For background on Elkins's case, see generally Jim Petro & Nancy Petro, *False Justice: Eight Myths that Convict the Innocent* 9-61 (2010).

attempted murder, for his supposed role in a 2000 shooting in Aurora, Illinois in which one man was killed and another paralyzed. His conviction was upheld on appeal, and he was ultimately sentenced to 70 years in prison. His projected parole date was 2057.

In 2011—in connection with another case, and completely unbeknownst to Moore—a confidential informant who had been present at the 2000 shooting approached the Aurora police with information that Moore was not the shooter. This witness provided the police with other information that led to the reopening of the investigation into Moore's case. In the course of this investigation, the Aurora police conducted interviews—including interviews that the original investigators never conducted—that corroborated the informant's statements and severely undermined the original case against Moore that was presented to the jury.

The new evidence so strongly cast doubt on Moore's guilt that prosecutors agreed that he should be released. With the assistance of the Downstate Illinois Innocence Project (now the Illinois Innocence Project), Moore was released from prison in March 2012. At the time he was released, the Aurora police's investigation into the murder and attempted murder of which Moore was convicted remained ongoing.

The evidence that exonerated Jonathan Moore and ultimately led to his release arose by complete serendipity. Not only would Moore likely have remained in prison if the confidential informant had not approached the police, he also would likely have remained incarcerated if the Aurora police had not

gone to such efforts to investigate the matter and ensure that an innocent person had not been imprisoned.[9]

3. Gary Gauger

In 1993, Morris and Ruth Gauger, an elderly couple, were brutally killed on their farm in Richmond, Illinois. Each was beaten and stabbed. The Gaugers' son Gary became the immediate suspect because he was alleged to have acted strangely when the bodies were discovered. Police questioned Gauger for 21 hours, during which he allegedly made incriminating statements. A jury convicted Gauger of his parents' homicide six months later.

In 1996, a federal district court overturned Gauger's conviction. A fortuitous wiretap—completely unrelated to Gauger's case—eventually cleared Gauger's name and identified the real perpetrators. By chance, the Bureau of Alcohol, Tobacco and Firearms used a wiretap in its investigation of a violent relationship between the "Outlaws" (a motorcycle gang) and the "Hells Angels." The wiretap unexpectedly picked up two of

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[9] For background on Moore's case, see generally Patrick Yeagle, *Incarcerated But Innocent: Illinois Innocence Project Expands Work to Free the Wrongfully Convicted*, Illinois Times, Apr. 26, 2012; Chris Dettro, *UIS Group Helps Free Aurora Man*, The State Journal-Register, Mar. 8, 2012, at 13; Clifford Ward, *Aurora Man is Freed After Conviction Vacated*, Chi. Trib., Mar. 7, 2012, at C9; Harry Hitzeman, *Man Exonerated 12 Years After Shooting*, Chicago Daily Herald, Mar. 7, 2012, at 1.

the Outlaws bragging about having murdered the Gaugers without consequence, because the Gaugers' son had been convicted.

Regardless of Gauger's diligence, he was actually innocent. But it took a serendipitous turn to prove it.[10]

These cases highlight the unique and difficult nature of an innocence investigation and that conclusively exonerating evidence may be discovered irrespective of diligence. This is so even when a prisoner has the support of the Network and one of the Innocence Projects or other dedicated outside resources.

B. Many Petitioners Have Limited Access to Legal Resources and Individuals To Assist in an Investigation Outside of Prison.

Even petitioners who are fortunate enough to have the resources of a dedicated family member, counsel, or an organization like an Innocence Project face a daunting task in gathering the evidence necessary to prove actual innocence. Most petitioners not only lack these resources, but also labor under a variety of disadvantages that would make failure to

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[10] For background on Gauger's case, see generally Ray Quintanilla, *Gauger Set Free in Killing of Parents; McHenry County Man on Death Row 3 Years*, Chi. Trib., Oct. 5, 1996, News, at 1; Dave Daley, *Biker Is Convicted of '93 Killings of Richmond Couple; Another Outlaw Found Guilty in Murder of Hell's Angel on Northwest Side in '95*, Chi. Trib., June 16, 2000, Metro Chicago, at 3; Marshall, *supra*, at 86.

recognize the innocence gateway, or imposing a diligence requirement on that gateway, unjust. A lack of resources has a substantial impact on a petitioner's ability to conduct a thorough investigation to support his claim of innocence.

Without assistance from counsel, it is undoubtedly challenging for petitioners to submit compelling habeas petitions. Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451, 481 (1990/1991) ("Anyone who has represented condemned inmates, or who has read their pro se papers, must recognize the absurdity of such people preparing meaningful habeas petitions and supporting memoranda."). Their task is made even harder by well known deficiencies in and lack of access to prison law libraries. *See, e.g.*, Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. Pa. J. Const. L. 819, 829-30 (2008) (describing States' dismantling of prison law libraries in the wake of *Lewis v. Casey*, 518 U.S. 343 (1996)). Perkins lacked access to a law library for five years. Resp. Br. at 9.

Petitioners navigating the habeas process on their own will frequently have great difficulty in gathering exculpatory evidence in a timely fashion. A diligence requirement, moreover, is unlikely to account for the great practical challenges petitioners face in conducting investigations. A recent article acknowledges this conundrum: Petitioners are not equipped to conduct a factual investigation as an attorney would, but courts often fail to appreciate

this impediment fully when assessing whether the petitioner should have discovered evidence earlier:

> But the petitioner must make the case for why he failed to discover the claim or claims earlier. Without more, his pro se status, which encompasses the fact that he is incarcerated without outside legal and investigative assistance to uncover facts that might support a claim for habeas relief, will not suffice. Once again, federal courts engage in mythical thinking in assuming that the average incarcerated inmate is as able to litigate and conduct factual investigations as the professional attorney.

Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-To-The-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219, 1234-35 (2012) (citation omitted); *accord* Zheng, *supra*, at 2135 ("It is convenient to blame prisoners for inactivity, but prisoners generally lack the resources necessary to conduct a thorough investigation of the new evidence by themselves. If they hastily file a habeas corpus petition whenever some new clue emerges, they will most likely be found to be abusing the system.").

In addition to the lack of adequate legal representation, many petitioners likewise lack assistance from non-attorneys on the outside. Without such non-attorney sleuths investigating the facts, it is exceedingly difficult to prove one's actual innocence. One example is Gary Gauger. See *supra*,

Section II.A.3. Although Gauger was innocent, he did not have means to prove it—nor did he have assistance from anyone on the outside who could investigate on his behalf. After being released from prison, Gauger lamented the inability to investigate while he was imprisoned: "While I was in prison, no one was investigating to find out who killed my parents." Quintanilla, *supra*, at 1. Having a resource outside of the confines of prison to conduct an investigation is undoubtedly a key advantage. *See supra*, Section II.A.1 (explaining how Elkins's wife was ultimately able to disprove that Elkins had committed the crime); *accord* Liebman, *supra*, at 2051 n.84 (attributing many prisoners' eventual exonerations to "luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release").

C. Many Petitioners Suffer from Mental Disabilities, Lack of Education, and Low Intelligence, All of Which Hinder or Preclude an Investigation.

Another significant impediment faced by many petitioners is their mental-health conditions and/or low intelligence. Although not all petitioners suffer from mental illness or low intelligence, the statistics are dismal. *See* Uhrig, *supra*, at 1253 (describing the relative mental health of the inmate population as "bleak"); Mello & Duffy, *supra*, at 481 ("[M]any condemned inmates are illiterate, uneducated, mentally impaired, or any combination of the three."); *Lewis*, 518 U.S. at 354 (describing the prison

population as "mostly uneducated and indeed largely illiterate").

According to a 2006 Department of Justice study, mental illness is far more prevalent among prisoners than among the general public. As of the middle of 2005, more than half of all prison and jail inmates had a mental-health problem. *See* Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/mhppji.pdf. The study further found that approximately 4 in 10 local jail inmates and 3 in 10 State and Federal prisoners had symptoms of a mental-health disorder, without a recent history. *Id.* at 3. To give perspective, the study also reported that approximately 1 in 10 persons age 18 or older in the general population met the DSM-IV criteria for the symptoms of a mental-health disorder. *Id.* at 5 (relying on data in the National Epidemiologic Survey on Alcohol and Related Conditions, 2001-2002). Thus, prisoners demonstrate significantly higher levels of mental illness than non-incarcerated individuals.

Similarly, prisoners have significantly less education and lower intelligence than the average non-incarcerated individual. *See* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U. L. Rev. 513, 549 (1988) ("Intelligence and educational levels among prisoners as a group are very low."). Prisoners are statistically far less educated than the general public. Caroline Wolf Harlow, U.S. Dep't of Justice, *Education and Correctional Populations* 1-2 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/

ecp.pdf (approximately 41% of prisoners in State and Federal prisons and local jails had not completed high school or the equivalent); *accord* Shelley Johnson Listwan et al., *How To Prevent Prisoner Re-Entry Programs From Failing: Insights From Evidence-Based Corrections*, 70-DEC Fed. Probation 19, 21 (2006) (only 40% of adult inmates finished their high-school education); Mello, *supra*, at 549 (in most states, the average prisoner only had eight years of education).

In addition, prisoners demonstrate significantly lower literacy levels than non-incarcerated individuals. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Office of Educ. Research & Improvement, No. NCES 1994-102, *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* 17, 20 (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf.

Prisoners also are more likely to have learning disabilities. *See id.* at xxiii (11% of prisoners reported having learning disabilities, compared to 3% of the general population).

These mental-health and educational deficiencies create a further impediment to prisoners' ability to conduct investigations and timely file petitions sufficient to obtain post-conviction relief: "Given that many inmates do not have a high level of education and that many suffer from mental illness, navigating the post-conviction appeals process poses, at the very least, a daunting challenge." Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 Geo. J. on Poverty L. & Pol'y 247, 259 (2011).

The unquestionable investigational challenges faced by many habeas petitioners support an actual-innocence gateway that is applied without a diligence requirement, especially in light of the central importance of protecting those who are innocent.

III. Recognizing the Continued Vitality of the Actual-Innocence Gateway Would Not Impose Additional Burdens on Federal Courts.

Recognizing that the *Schlup* gateway permits actually innocent petitioners to bring first-time habeas petitions outside the one-year limitations period with no diligence requirement will not needlessly burden the courts or litigants. *Contra* Pet. Br. at 24-25; States' *Amici* Br. at 11-15. The substantive and procedural hurdles faced by a petitioner asserting actual innocence in a habeas proceeding, along with the fact that innocence claims are rare, ensure that judicial resources will not be taxed by a traditional application of *Schlup*.

A. Petitioners Rarely Claim Actual Innocence.

As Judge Friendly remarked more than 40 years ago: "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970). This Court acknowledged in *Schlup* that Judge Friendly's insight "remains largely true today." 513 U.S. at 322.

Nevertheless, it is a common misconception that all prisoners—even those who are undeniably guilty—maintain their innocence, and that their claims of innocence risk burdening busy courts. *See, e.g.*, States' *Amici* Br. at 14. Research, however, suggests otherwise.

A study of federal habeas petitions, which examined more than 1,500 non-capital habeas cases filed by state prisoners, concluded that fewer than 4% of petitioners raised "new evidence of innocence of the offence of conviction—either DNA or non-DNA." Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 15-18, 30 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. Among capital cases, in which the stakes are undeniably higher, that number rises to a still-small 10.8%. *Id.* at 29. These numbers cohere with anecdotal evidence that the number of prisoners who insist on their innocence is small. *See, e.g.*, Petro and Petro, *supra*, at ix, 217-19 (presenting anecdotal evidence from Lauren McGarity, mediator and prison educator, that of the "nearly one thousand" convicted felons that she has known, only two have said they are innocent).

The number of prisoners who claim to be actually innocent may indeed be smaller than the number of prisoners who are actually innocent. Another study analyzed a sample of individuals who had been proven to be actually innocent by post-conviction DNA testing. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 64-65 (2008). Of 133 exonerated individuals who received a written ruling on their claims, only 16 at any point raised a state-law claim seeking a new trial on the basis of

newly discovered evidence of innocence. *Id.* at 110-11. None of these 16 prisoners received relief on these claims. *Id.* Moreover, none of this group raised *Schlup* to invoke the "actual innocence" exception to procedural default, and only five raised a freestanding actual-innocence claim under *Herrera*. *Id.* at 110-12.

Because prisoners do not routinely claim their actual innocence, the States' concern that recognizing an equitable exception to § 2244(d) would result in a deluge of actual-innocence claims is unfounded.

B. Actual Innocence Is Difficult To Demonstrate.

There is a reason why not every prisoner—not even every actually innocent prisoner—raises actual-innocence claims in post-conviction proceedings: actual innocence is difficult to demonstrate, and victories on such claims are rare.

The *Schlup* standard is a demanding one. Satisfying that standard, which permits a petitioner to overcome procedural default and proceed with his habeas petition, requires evidence that must be both new (*i.e.*, not presented at trial) and credible. *Schlup*, 513 U.S. at 324. Sufficient evidence might consist, for example, of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* In weighing whether the petitioner has made the appropriate showing, a court must consider the new evidence as part of "all the evidence" (including the evidence at trial, which a jury has necessarily found sufficient to convict) and including the "timing of the submission" (which will

be long after the petitioner's conviction and incarceration). *Id.* at 328, 332.

Moreover, a petitioner must have all the necessary evidence before filing his petition: a habeas petition is not a matter of notice pleading followed by an opportunity to take discovery. It is thus no surprise that both this Court and the Courts of Appeals have remarked upon the considerable hurdles that a petitioner must surmount to pass through the *Schlup* gateway. *See, e.g.*, *House*, 547 U.S. at 538 ("[I]t bears repeating that the *Schlup* standard is demanding and permits review only in the 'extraordinary' case.").

As this Court has noted, "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare," and "[t]he threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing." *Schlup*, 513 U.S. at 324. The high standard for demonstrating actual innocence mitigates any burdens that might be placed on courts and litigants by recognizing an equitable exception to § 2244(d).

C. Actually Innocent Petitioners Have No Incentive To Delay Filing Their Habeas Petitions.

Actually innocent petitioners have no reason to wait to file a habeas petition any longer than necessary to gather the evidence needed to support the petition. *Contra* Pet. Br. at 18; States' *Amici* Br. at 13.

First, an inmate who is actually innocent has no interest in languishing in prison any longer than absolutely necessary. And only an actually innocent petitioner can successfully invoke *Schlup* as a gateway to permit a filing after the limitation period expires. Non-capital prisoners who are guilty of the underlying crime—and thus have no hope of passing through the *Schlup* gateway—also have little incentive to delay their habeas petitions.

Second, *amici* point out that when habeas petitioners delay in filing their petitions, "[w]itnesses die or move away; physical evidence is lost; memories fade." States' *Amici* Br. at 13-14 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting)). Accordingly, *amici* argue, a State's ability to defend its original verdict degrades with time. But a petitioner's ability to build his case for actual innocence deteriorates to the same extent as a State's ability to defend its original verdict. Witnesses for the State do not die or move away any faster than witnesses whose testimony can help prove innocence. Moreover, because the petitioner bears the burden of proof in a habeas proceeding, *see, e.g.*, *Herrera*, 506 U.S. at 399-400, the passage of time and degradation of evidence ultimately benefit the State more than they do the habeas petitioner.

Third, under *Schlup*, a court may take into account "how the timing of the submission . . . bear[s] on the probable reliability of [the new] evidence." 513 U.S. at 332. An actually innocent petitioner—or even a guilty one acting in bad faith—is thus aware that convenient or unexplainable delays could very well serve to render his already steep burden an insurmountable one.

D. A Holding That the Miscarriage-of-Justice Doctrine Does Not Create an Equitable Exception to § 2244(d), or That Such an Exception Requires Diligence, Would Impose Additional Burdens on Courts.

The Warden advocates for a rule that the miscarriage-of-justice doctrine does not create an equitable exception to AEDPA's statute of limitations, or that such an exception requires reasonable diligence by the habeas petitioner. *See, e.g.*, Pet. Br. at 6. Either rule, however, would impose additional burdens on busy district courts. This is true for two reasons.

First, it would encourage actually innocent petitioners to file a premature first habeas petition before filing their complete and fully investigated petition. Such a situation burdens both actually innocent petitioners as well as courts. Like Perkins, some actually innocent petitioners must slowly build a case that demonstrates their innocence based upon multiple pieces of evidence that are not, standing alone, dispositive of actual innocence. As discussed above, this process can be haphazard, aggregative, and time-consuming.

Absent an equitable exception to § 2244(d), actually innocent petitioners would likely be forced to file a not-yet-final first petition just before the limitations period expires to avoid having their petition barred as untimely. 28 U.S.C. § 2244(d)(1). Perhaps that premature, not-fully-investigated petition will suffice to persuade the district court of

the petitioner's innocence, but more likely not. Indeed, the formality of filing an incomplete, partially investigated claim—which is unlikely to be as meritorious as one presenting the full fruits of an investigation—is more likely to be a needless drain on the resources of the courts, the petitioner, and the State. That would benefit no one. *Cf. Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (requiring petitioners to file premature claims for purely procedural reasons amounts to "[a]n empty formality" that does not "respect[] the limited legal resources available to the States"). Attorneys representing petitioners under these circumstances will be put in an untenable position: they will be forced to choose between filing a weak, incompletely investigated petition—likely to the detriment of their client's interests—and completing their investigation but risking that the petition will be barred as untimely or the product of undue delay. The Warden's proposed rule thus encourages needless, piecemeal litigation.

Second, requiring district courts to assess an actually innocent petitioner's diligence necessarily requires district courts to expend more of their scarce resources. A rule that requires district courts to review and rule upon a petitioner's diligence is inevitably a rule that taxes the resources of busy district courts.

IV. Clemency Is No Answer.

That a State *may* grant clemency to a person who is actually innocent provides no solution for the injustices that could result if the Court were to hold that there is no innocence gateway or that diligence is required. Grave problems with how clemency is

structured and currently administered by the various States are well documented. As a result, clemency is no longer the fail-safe posited by the Court in *Herrera*, if it ever was.

In many States, who is granted clemency is a matter of politics and influence. In some states, the governor, an elected official, has sole and unfettered discretion in whether to grant clemency. As a result, whether to grant clemency may turn largely on the State's political climate. As explained in the Kennedy Commission Report, "The political reality is that there are few criticisms of officials who say 'no' to a clemency request, and there is considerable risk of political backlash if an offender released by action of the executive commits another crime." Am. Bar Ass'n Justice Kennedy Comm'n, *Report with Recommendations to the ABA House of Delegates* 69 (2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf ("Kennedy Commission Report"); *see also* Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. Rev. 1825, 1827 (2002) (describing California clemency procedure as "standardless in procedure, discretionary in exercise, and unreviewable in result"). "Governors and presidents often seem to treat clemency as a quasi-illegitimate power that they are reluctant to exercise." [11] Testimony of

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[11] Even in States in which a Board may review the evidence submitted with a clemency petition, there is no guarantee the evidence will be reviewed, much less that relief will be provided.

Professor Daniel T. Kobil, *The Role of Clemency in Providing Mid-Course Corrections of Sentence* before the ABA Justice Kennedy Commission 8 (Nov. 12, 2003).

Moreover, use of clemency has atrophied in recent decades. *See, e.g.*, Kennedy Commission Report, *supra*, at 70 ("[I]n almost every jurisdiction the instance of pardoning decreased markedly after 1990."); Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 Law & Soc'y Rev. 183, 186 n.8 (2008) (currently low clemency rates "represent[] a radical shift from several decades ago, when governors granted clemency in 20 to 25 percent of the death penalty cases they reviewed"); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 Buff. Crim. L. Rev. 967-1006 (2001).

In sum, clemency cannot be relied upon as the fail-safe for the actually innocent envisioned by the *Herrera* Court and urged by *amici*.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Innocence Network respectfully urges the Court to affirm the Sixth Circuit's judgment.

Respectfully submitted,

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